170 FERC ¶ 61,224
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Tri-State Generation and Transmission Association, Inc. Docket No. EL20-16-000

ORDER GRANTING IN PART AND DENYING IN PART PETITION

(Issued March 20, 2020)

1. On December 23, 2019, Tri-State Generation and Transmission Association, Inc. (Tri-State) filed a petition for declaratory order (Petition), pursuant to Rule 207 of the Commission's Rules of Practice and Procedure.[1] Tri-State states that it seeks guidance from the Commission to provide certainty regarding Tri-State's jurisdictional status and the Commission's exclusive regulatory jurisdiction over Tri-State. Tri-State states that such guidance is necessary to determine whether state regulatory proceedings are preempted. In this order, we grant in part, and deny in part, the Petition, as discussed below.

I. Background

2. Tri-State is a generation and transmission cooperative that provides wholesale electricity to its 43 member electric distribution cooperatives and public power districts (Utility Members) in Colorado, Nebraska, New Mexico, and Wyoming at cost-based rates pursuant to long-term contracts. A 43-seat Board of Directors (Board) controls Tri-State, with each of Tri-State's 43 Utility Members occupying one seat on the Board.

3. Tri-State supplies power to its Utility Members through a portfolio of ownership interests in generation, tolling agreements, power purchase agreements, and open market purchases. Tri-State provides transmission service to its Utility Members via Tri-State's approximately 5,665 miles of high-voltage transmission lines, the majority of which operate as part of the Western Interconnection.[2]

[1] 18 C.F.R. § 385.207(a)(2) (2019).

[2] A portion of Tri-State's transmission facilities supports its load centers in the Eastern Interconnection and is under the functional control of Southwest Power Pool, Inc.

4. In July 2019, Tri-State submitted a set of filings to the Commission in anticipation of becoming a public utility subject to the Commission's jurisdiction.[3] Tri-State explained that, under FPA section 201(f),[4] it had been exempt from the Commission's jurisdiction under Part II of the FPA[5] because it was wholly owned by entities that were themselves exempt from the Commission's jurisdiction under FPA section 201(f). Tri-State stated that it would cease to be wholly owned by such entities on or around September 22, 2019, due to the admission of one or more new members/owners (Non-Utility Members) that will not be an electric cooperative or a governmental entity. Tri-State represented that admission of the new Non-Utility Members would cause Tri-State to cease to be wholly owned by entities that are themselves exempt under FPA section 201(f), and that Tri-State will then become a public utility subject to the Commission's jurisdiction. On September 3, 2019, Tri-State filed an amendment to the July 2019 filings notifying the Commission that Tri-State admitted Mieco, Inc. (Mieco), a wholesale energy services company and subsidiary of Marubeni America Corporation, as a new Non-Utility Member. On October 4, 2019, the Commission rejected without prejudice Tri-State's filings, finding that Tri-State provided insufficient cost support for its proposed rates and had failed to comply with the Commission's rate schedule filing requirements.[6]

5. Tri-State states that Article I, section 4(a) of the Bylaws permits a Utility Member to withdraw "upon compliance with such equitable terms and conditions as the [Board] may prescribe provided, however, that no member shall be permitted to withdraw until it has met all its contractual obligations to this Corporation,"[7] and that, "[i]n this context, equitable terms necessarily include payment of an exit charge to compensate Tri-State

[3] *Tri-State Generation & Transmission Ass'n, Inc.*, Docket No. ER19-2440-000, et al. (July 2019 filings). Tri-State's July 2019 filings included a stated rate tariff; Utility Member Wholesale Service Contracts; an Open Access Transmission Tariff; and an application for market-based rate authority.

[4] 16 U.S.C. § 824(f) (2018).

[5] 16 U.S.C. §§ 824-824w (2018).

[6] *Tri-State Generation & Transmission Ass'n, Inc.*, 169 FERC ¶ 61,012, at P 22 (2019).

[7] Petition at 6 (quoting Petition, Ex. E, at art. I, § 4). On December 27, 2019, Tri-State filed its Bylaws in Docket No. ER20-691-000.

and remaining Members for the loss of the long-term revenue stream the withdrawing Member had committed to contribute."[8]

II. The Petition

6. Tri-State seeks an order from the Commission declaring that:

> (1) Tri-State is now, and since September 3, 2019, has been, a non-exempt jurisdictional "public utility" for purposes of Part II of the [FPA];
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> (2) the Commission has (and has had, since September 3) exclusive jurisdiction under sections 205 and 206 of the FPA[9] over the terms, including exit charges, on which a Tri-State Member can terminate its full requirements [Wholesale Service Contract] with Tri-State; and
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> (3) therefore, any state [public utility commission] jurisdiction over complaints by Tri-State Members concerning such exit charges is preempted.[10]

7. Tri-State asserts that the relief requested in the Petition is necessary to terminate controversy and remove uncertainty due to pending complaints filed in November 2019 before the Colorado Public Utilities Commission (Colorado PUC) by two Tri-State members, La Plata Electric Association, Inc. (La Plata) and United Power, Inc. (United Power).[11] Tri-State states that each of those complaints asks the Colorado PUC to "establish[] an exit charge [for the Member to be relieved of its obligations under its Wholesale Service Contract and exit Tri-State] that is just, reasonable, and

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[8] *Id.*

[9] 16 U.S.C. §§ 824d, 824e.

[10] Petition at 1.

[11] *Id.* at 1-2 (citing Ex. A (*La Plata Elec. Ass'n., Inc. v. Tri-State Generation & Transmission Ass'n, Inc.*, Formal Complaint, Colo. PUC Docket No. 19F-0620E (Nov. 5, 2019) (La Plata Complaint)); Ex. B (*United Power, Inc. v. Tri-State Generation & Transmission Ass'n, Inc.*, Formal Complaint, Colo. PUC Docket No. 19F-0621E (Nov. 6, 2019) (United Power Complaint))).

nondiscriminatory."[12] Tri-State asserts that neither La Plata nor United Power has told Tri-State that it definitely intends to exit Tri-State or requested from Tri-State a final determination of applicable exit charges.[13]

III. Notice of Filings and Responsive Pleadings

8. Notice of the Petition was published in the *Federal Register*, 85 Fed. Reg. 503 (2020), with interventions and protests due on or before January 13, 2020. On January 10, 2020, the deadline for filing interventions and protests was extended to January 21, 2020. On January 17, 2020, a notice was issued denying a further extension of the deadline.

9. The Appendix to this order lists the entities that filed notices of intervention, motions to intervene, motions to intervene out-of-time, motions to lodge, protests, comments, and answers.

IV. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the notice of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d), we grant the late-filed motions to intervene given their interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

11. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest or answer unless otherwise

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[12] *Id.* (quoting Ex. A, La Plata Complaint, at 20; Ex. B, United Power Complaint, at 24).

[13] *Id.* at 12. Tri-State states that, in the past five years, two of Tri-State's Utility Members have withdrawn or are in the process of withdrawing from Tri-State: Kit Carson Electric Cooperative (Kit Carson) in 2016, and Delta-Montrose Electric Association (Delta-Montrose), to be effective in May 2020. Tri-State and Delta-Montrose have reached a settlement agreement on withdrawal terms, and Tri-State states that it expects to file the resulting termination-related agreements with the Commission shortly. *Id.* at 6.

ordered by the decisional authority. We accept the answers because they have provided information that assisted us in our decision-making process.

12. Motions to lodge information from other proceedings may be appropriate in some instances to supplement the Commission's record.[14] Here, we find that the evidence contained in the motion to lodge jointly submitted by La Plata and United Power has assisted us in our decision-making process, and we, therefore, grant their motion to lodge.

B. Substantive Matters

1. Tri-State's Jurisdictional Status

a. Petition

13. Tri-State requests that the Commission find that it has been subject to the Commission's jurisdiction since September 3, 2019, when it claims its exempt status under FPA section 201(f) ended.[15] Tri-State argues that the FPA section 201(f) exemption only applies if an entity is wholly owned by other exempt entities, like cooperatives or public power districts, that are themselves exempt under FPA section 201(f). Tri-State argues that because Mieco, an entity not exempt under FPA section 201(f), acquired an ownership interest in Tri-State on September 3, 2019, Tri-State is no longer exempt from FPA section 201(f).

14. Tri-State represents that Mieco supplies natural gas to purchasers throughout the United States, and currently provides natural gas to Tri-State's generation facilities. Tri-State also states that Mieco is not an electric cooperative or governmental entity, and it is not owned by electric cooperatives or governmental entities in the United States. Tri-State represents that it accepted Mieco as a Non-Utility Member on September 3, 2019.[16]

15. Tri-State states that Mieco earns patronage capital in Tri-State pursuant to Mieco's Non-Utility Member Agreement with Tri-State. Tri-State explains that Mieco's patronage account represents an ownership interest in Tri-State that entitles it to a share of the proceeds if Tri-State is dissolved. Tri-State represents that like Tri-State's Utility Members, Mieco has a vote as a Member on important matters relating to Tri-State's governance, such as amendments to Tri-State's Articles of Incorporation, amendments to

[14] *See, e.g., Cal. Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,072, at P 8 (2012).

[15] *E.g.,* Petition at 13-14 (referencing 16 U.S.C. § 824(f)).

[16] *Id.* at 10 (citations omitted).

its Bylaws, and any sale, mortgage, lease, disposition, or encumbrance of any substantial portion of the cooperative's property.[17]

16. Tri-State argues that, "[i]n addressing issues under [FPA] section 201(f), the Commission looks to the 'plain language' of the statute."[18] Tri-State further claims that, in contrast to other federal regulatory statutes, FPA section 201(f) addresses only corporate ownership but does not address corporate control or the potential to influence governance and operations. Tri-State adds that the FPA section 201(f) exemption applies only if the entity is "wholly" owned by exempt entities and does not require a non-exempt minority ownership interest to have any particular value to prevent the exemption from applying. Tri-State asserts that, consequently, minority ownership with no control or minimal value is still sufficient to end the exemption.[19]

17. Tri-State explains that, in *Enron*, Enron Power Marketing, Inc.'s (Enron) central argument was that the FPA section 201(f) exemption applied to Amtrak because Amtrak was wholly owned by the U.S. Government. According to Tri-State, Enron argued that the U.S. Government owned 100% of Amtrak's preferred stock, which represented more than 90% of the total stock, the remaining stock (common stock) was owned by four private railroads, and the U.S. Government exercised complete control over Amtrak. Tri-State argues that the Commission rejected Enron's arguments on the basis that, despite the lack of private control or influence on Amtrak's board, governance, and operations, privately held stock of some value was sufficient to make Amtrak "wholly owned" by the U.S. Government for purposes of FPA section 201(f).[20]

18. Tri-State argues that, as a cooperative organized under Article 55 of Title 7 of the Colorado Revised Statutes, Tri-State does not issue stock. Nonetheless, it argues that the *Enron* analysis applies here and that, for membership cooperatives, the best analogy to common stock is patronage capital.[21] Tri-State explains that cooperative members acquire patronage capital through transactions that they make with the cooperative that

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[17] *Id.* at 19 (citation omitted).

[18] *Id.* at 14 (citing *Delta-Montrose Elec. Ass'n*, 151 FERC ¶ 61,238, at P 27 (2015) (*DMEA*); *Enron Power Mktg*., *Inc.*, *v. Pennsylvania-New Jersey-Maryland Interconnection,* 83 FERC ¶ 61,032, at 61,066-67 (1998) (*Enron*)).

[19] *Id.*

[20] *Id*. at 14-15 (citing *Enron*, 83 FERC ¶ 61,032 at 61,066-68).

[21] Patronage capital is excess revenue, after operating expenses and costs, that is returned to cooperative members. *Sw. Power Pool Inc.*, 147 FERC ¶ 61,003, P 8 n.16 (2014).

benefit the cooperative financially. Tri-State reasons that, therefore, consistent with *Enron*, any cooperative member who has acquired any patronage capital in a cooperative is an owner, regardless of the value of the capital or the amount of influence on the cooperative's governance or operations.[22]

19. Tri-State further argues that in 2015 the Commission applied these principles to Tri-State in *DMEA*, in which the Commission explained:

> Tri-State is a non-profit cooperative corporation and, under the membership agreements, each member has a patronage account representing each member's ownership interest in the corporation, i.e., the amount a member pays for energy which exceeds Tri-State's cost of service, and upon dissolution each member is entitled to an equitable share of the assets, and each member has a vote in Tri-State's operations.[23]

Tri-State observes that the Commission concluded that Delta-Montrose was a co-owner of Tri-State without inquiring into whether its patronage account was quantified or whether Delta-Montrose had any control or meaningful influence of Tri-State.[24]

20. Tri-State claims that the Mieco Non-Utility Membership Agreement (Mieco Membership Agreement), demonstrates that Mieco owns and continuously earns patronage capital in Tri-State pursuant to section 3.2 of that agreement. Tri-State points out that section 3.2 provides that each year Tri-State's accounting personnel will make a determination of Mieco's contribution to net margin (or loss) from Tri-State's power sales to Members by calculating a percentage of such net margin (or loss) to be attributed to Mieco "on a basis designed to approximate the value [Mieco's] sales of natural gas contributed to the electric power sales made by Tri-State to its members."[25] Tri-State also states that section 3.2 further provides that "[t]he margins attributed to [Mieco] will be allocated entirely as capital credits to [Mieco] (unless the Tri-State Board of Directors determines to distribute all or a portion of the allocated margins in cash)."[26] Tri-State states that Mieco's first allocation of margin for its patronage capital account will be determined in early 2020 with the closing of Tri-State's books for 2019, and that

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[22] Petition at 15-17.

[23] *DMEA*, 151 FERC ¶ 61,238 at P 19.

[24] Petition at 17.

[25] Petition, Ex. G, Mieco Membership Agreement, at 2 (§ 3.2).

[26] *Id*.

accounting determination will represent capital rights that have accrued to Mieco under the Mieco Membership Agreement since September 3, 2019.[27]

21. Tri-State argues that, because patronage capital is the equivalent of common stock, and because Mieco has patronage capital, consistent with *Enron*, no other indicia of ownership are required to establish that Tri-State is no longer exempt from Commission regulation under section FPA 201(f). Tri-State argues that, although in *DMEA* the Commission noted other indicia of ownership in support of its finding that Delta-Montrose was a co-owner of Tri-State, it did not suggest that those indicia were essential. Tri-State argues that in any event, the Mieco Membership Agreement provides Mieco with all of the indicia of ownership that the Commission mentioned in *DMEA*. Tri-State notes that, in addition to the patronage capital account, section 3.3 of the Mieco Membership Agreement confers to Mieco the same patronage-based rights to share in Tri-State's dissolution as other Tri-State Utility Members have. Further, Tri-State notes that section 3.4 of the Mieco Membership Agreement grants Mieco a vote as member, which includes: votes to amend Tri-State's Articles of Incorporation and/or Bylaws; votes to allow membership classes other than Utility Members to have seats on the Board; and the sale mortgage, lease, disposition or encumbrance of any substantial portion of Tri-State's property.[28]

b. Comments and Answers

i. Preliminary and Threshold FPA Section 201(f) Issues

22. Alliance Power Incorporated and Colorado Highlands Wind, LLC (collectively, Alliance), Empire Electric Association, Inc. (Empire), K.C. Electric Association (K.C. Electric), High West Energy, Inc. (High West Energy), Highline Electric Association (Highline), and Midwest Electric Cooperative (Midwest) state that they fully support the relief Tri-State requests in the Petition.[29] Wheat Belt argues that as of September 3, 2019, Tri-State is no longer wholly owned by entities that are exempt from the Commission's rate regulation.[30]

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[27] Petition at 17-18.

[28] *Id*. at 18-19.

[29] Alliance Comments at 1, Empire Comments at 1; K.C. Electric Comments at 1; High West Energy Comments at 1; Highline Comments at 1; Midwest Comments at 1.

[30] Wheat Belt Comments at 2.

23. The Colorado PUC claims that granting Tri-State's Petition now would cause confusion and could impact other entities. The Colorado PUC also urges the Commission to set the Petition for hearing or reject the Petition until after it has completed its review of the transaction under Colorado law.[31]

24. In its February 5, 2020 answer (February 5 Answer),[32] Tri-State argues that it would be better for the Commission to provide jurisdictional certainty now than to wait for resolution of Colorado PUC proceedings. Tri-State argues that the Commission is the proper forum for interpreting whether FPA section 201(f) applies. Tri-State further argues that all state law issues here are generic issues of property or corporate law, over which the Colorado PUC has no special expertise.[33]

25. With respect to the Petition's merits, Wheat Belt asserts that the Commission should reject the claims of La Plata, Sierra Club, and the Colorado PUC about the scope and limits on the Commission's jurisdiction and affirm that the rates, terms, and conditions by which Tri-State provides wholesale electric service to its members have been subject to the Commission's exclusive jurisdiction since September 3, 2019. Next, Wheat Belt argues that the Commission does not need to rule on jurisdiction to trigger jurisdiction. Wheat Belt contends that if the Colorado PUC is correct that a Commission ruling is necessary to trigger Federal regulation, FPA section 205(d) would not make sense because the obligation to file would arise after the Commission accepted the filing.[34] Wheat Belt also contends that there would be no basis for penalties for

[31] Colorado PUC Protest at 29-30.

[32] Tri-State includes as exhibits: (A) a copy of Tri-State's status of good standing from the Delaware Department of State Division of Corporations' website; (B) a description of Meico's parent company, Marubeni America Corporation, from its website; (C) a snapshot of Marubeni Corporation's ownership statistics from its website; (D) a description of Mieco from its website; (E) an affidavit of Patrick L. Bridges, Senior Vice President and Chief Financial Officer of Tri-State describing the preliminary patronage capital allocation made to Mieco and how the amount was calculated; (E1) Tri-State's Preliminary Capital Allocations for 2019; (F) an affidavit of Julie Kilty, Tri-State's Secretary, representing that Tri-State's board members voted to approve creating a new class of member on July 9, 2019; and (F1) a presentation describing the benefits of Mieco's ownership of Tri-State.

[33] Tri-State February 5 Answer at 5-7.

[34] Wheat Belt Answer at 9.

collecting revenue without rates on file with the Commission if a jurisdictional determination was a condition precedent to Commission jurisdiction.[35]

26. The Colorado PUC claims Tri-State must adequately show compliance with state law to override the existing FPA section 201(f) exemption.[36] The Colorado PUC notes that on February 12, 2020, a Hearing Commissioner issued an interim decision finding that the Colorado PUC has jurisdiction over the complaints filed by La Plata and United Power, and that such complaints are ripe for review.[37]

27. The Colorado PUC argues that Tri-State has failed to meet its burden of proof because Tri-State does not show that it has the necessary federal and state approvals to add Mieco, it does not show that admission of Mieco is permissible under state law, and it has failed to demonstrate that Mieco is an owner as provided in FPA section 201(f).[38] The Colorado PUC argues that Tri-State failed to provide any support as to why it may enter into these transactions without Commission approval under FPA sections 203[39] and 205.[40]

28. United Power argues that if the Commission were to find that Tri-State is a Commission-regulated utility, the Mieco Membership Agreement is an unfiled jurisdictional agreement that fundamentally alters the calculation of patronage capital allocations and affects rates, as the claimed consideration for the contract is a discount on the sales of gas to Tri-State. United Power claims that because gas is a cost of generation that necessarily affects Tri-State's rates, in particular, the Tri-State cost-justified stated rate, and therefore must be on file. United Power represents that the Commission recently found a similar membership agreement to be jurisdictional.[41]

29. Further, United Power argues that the Commission should reject the Mieco Membership Agreement, thereby nullifying Mieco's membership entirely. United Power

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[35] *Id*.

[36] Colorado PUC Protest at 22-23.

[37] *Id*. at 2.

[38] *Id.* at 19.

[39] 16 U.S.C. § 824b.

[40] Colorado PUC Protest at 19-20 (citations omitted).

[41] United Power Protest at 22; United Power Answer at 9-10 (citing *New England Power Pool Participants Committee*, 166 FERC ¶ 61,062, at P 48 (2019)).

contends that the accounting mechanism incorporated in the agreement is discriminatory toward Tri-State's load-serving Members (i.e., Tri-State's Utility Members) by essentially imputing purported revenue to Mieco for patronage capital purposes where none exists, and reducing other, legitimate load-serving members' patronage allocations. United argues that the patronage capital construct with Mieco leaves Tri-States' legitimate load-serving Members worse off.[42]

30. In its February 5 Answer, Tri-State disputes the Colorado PUC's argument that the Commission's prior approval might be required under FPA sections 203(a)(2) because it is unclear whether Mieco's parent company was a "holding company" in a holding company system that includes a transmitting utility or an electric utility. Nor was the value of the ownership interest clear. Tri-State asserts that Mieco's acquisition of its patronage capital interest in Tri-State did not require prior approval under section 203(a)(2), because no security interest with a value of more than $10 million, merger or consolidation was involved. Tri-State adds that the Mieco Membership Agreement does not need to be filed under section 205 because it does not involve, or directly affect or relate to, sales of electricity at wholesale, rates or charges for transmission service, or practices/contracts affecting or relating to such rates or service. Tri-State claims that *Arizona Public Service*, cited by the Colorado PUC, is not to the contrary. Tri-State represents that in that case, the Commission held that a section 205 filing was required when the utility altered the terms of a wholesale service contract by changing its termination date. In contrast, Tri-State asserts that the Mieco Membership Agreement does not begin, terminate, or otherwise alter a wholesale sale or transmission service, rate or contract related thereto; it merely has the effect of altering Tri-State's jurisdictional status.[43]

31. Sierra Club argues that Tri-State did not establish that Mieco was validly admitted as a member of Tri-State. According to Sierra Club, under Article 55 of Title 7 of the Colorado Revised Statutes, cooperatives should be organized for "the mutual benefit of all members" and meet specific procedural requirements designed to ensure transparency and the protection of member's rights, including that new members must be admitted under "uniform terms and conditions stated in its Bylaws."[44]

32. Sierra Club argues that Tri-State has not demonstrated that its admission of Mieco complied with the Colorado's cooperative regulations, given that Tri-State's Bylaws do not provide information on additional classes of membership or their terms and conditions of admission, but were only created by a Board resolution. Sierra Club

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[42] United Power Protest at 22-23.

[43] Tri-State February 5 Answer at 9-10.

[44] Sierra Club Protest at 12-13 (quoting Colo. Rev. Stat. § 7-55-101(d)).

argues, then, that until Tri-State amends its Bylaws, Mieco cannot validly be admitted as a member. Sierra Club adds that Mieco's membership does not appear to comply with the requirement for "uniform terms and conditions" given Mieco's "second class" membership status.[45]

33. Sierra Club and La Plata also question whether Tri-State's Bylaws bar it from allocating patronage in the way described in the Mieco Membership Agreement, because the Bylaws allocate patronage based on the amount by which member payments for wholesale electricity exceed the sum of "operating costs and expenses properly chargeable against the furnishing of electric power and energy" plus any amounts needed to offset prior losses or stabilize reserves. However, Sierra Club notes that the Bylaws provide no method of calculating patronage based on a member's sale of natural gas.[46] La Plata asserts that distributing patronage capital to Mieco based on natural gas services provided by Mieco to Tri-State runs counter to basic principles of cooperative patronage capital as a general matter and to Colorado's statutory scheme.[47]

34. In its February 5 Answer, Tri-State disagrees that there is a problem admitting a for-profit member, either under its Bylaws or articles of incorporation. It adds that nothing in the Colorado Revised Statutes bars Mieco's ownership. Regarding protesters' arguments about Mieco not receiving uniform terms and conditions of cooperative membership under Colorado law, Tri-State argues that Colorado law expressly contemplates different types of membership, which is also echoed in Tri-State's Bylaws. Finally, Tri-State disagrees with United Power's argument Mieco's membership without a board seat is a corporate nullity because it is inconsistent with Tri-State's articles of corporation, because Mieco expressly waived the provision and United Power has no standing to challenge it.[48]

35. United Power also argues Mieco's membership is inconsistent with Tri-State's articles of incorporation and Bylaws. United Power states, that despite the fact that Mieco consented to a lack of a board seat, there is no indication that the articles of incorporation or the Bylaws allow such a waiver. United Power represents that, Article I of Tri-State's Bylaws specifically provide that "[a]pplicants for membership in [Tri-State] shall be eligible for membership by… agreeing to comply with and be bound by

[45] *Id.* at 14-15.

[46] *Id.* at 18-19 (citing Tri-State Bylaws, at art. VII, § 3); La Plata Protest at 11-12.

[47] La Plata Protest at 12.

[48] Tri-State February 5 Answer at 10-11.

the Articles of Incorporation and Bylaws of [Tri-State]." United Power, therefore, argues that Mieco's ownership is a corporate nullity.[49]

36. Additionally, United Power claims that the Mieco "inferior membership class" arrangement disadvantages other members by diluting their patronage capital for the sole purpose of attempting a membership arrangement designed to escape complaints from several of its members. Therefore, United Power states that the negative impacts of Mieco's unilateral waiver of Tri-State's governing documents extends far beyond Mieco.[50]

37. La Plata asserts that Tri-State relies on a new conception of patronage capital of its own invention that is not contemplated in the Bylaws, in which Mieco's patronage capital is not based on revenue Mieco pays to Tri-State for electric energy service. La Plata argues that the prerequisite for patronage capital is the provision by the member of funds to the cooperative.[51] La Plata contends that, rather than memorialize this new form of patronage capital in the Bylaws, Tri-State instead relies on the Mieco Membership Agreement as the source of the new mechanism for providing patronage capital to non-Utility Members. La Plata claims that the fact that Colorado law permits cooperatives to distribute patronage capital to members who sell to, as well as buy from, the cooperative does not legitimize Tri-State's attempt to transform the concept of patronage capital into a construct that suits its purposes here.[52]

38. Sierra Club claims that Tri-State continues to fail to demonstrate that Mieco was validly admitted as a member under Colorado state law. Sierra Club argues that, for instance, because the Bylaws do not include the terms and conditions of admission for Mieco, Tri-State has not met the statutory requirement under section 7-55-101(d) of the Colorado Revised Statutes that new members to a cooperative must be admitted "upon meeting uniform terms and conditions stated in its Bylaws."[53] Sierra Club also claims that the December filings did not include any Board resolution demonstrating acceptance of Mieco. Further, Sierra Club contends that Tri-State provided no documentation that Mieco is a properly-formed and currently-existing entity that could enter into a valid

[49] United Power Answer at 6-7.

[50] *Id*. at 7.

[51] La Plata Answer at 6.

[52] *Id.* at 7.

[53] Sierra Club Answer at 7-8 (quoting Colo. Rev. Stat. § 7-55-101(d)).

contract. Even if Mieco was validly admitted, however, Sierra Club asserts that Mieco is still not an owner for FPA section 201(f) purposes.[54]

39. United Power argues that Mieco's membership is a sham transaction, such that the Commission should not find ownership for purposes of FPA section 201(f). United Power states that in *Marin Cty. v. United States* (*Marin*), the Supreme Court reversed a lower court that granted the Interstate Commerce Commission jurisdiction because the so-called "acquisition" was no more than a "paper transaction" that was "designed to escape, upon approval of the Interstate Commerce Commission, the practices and policies of the State Commission."[55] United Power argues that there is no more apt comparison to *Marin* than the Tri-State Filings, because Tri-State has gained new "member" Mieco for the express purpose of avoiding Colorado PUC jurisdiction through a "membership" arrangement that allegedly has no economic value to either party and amounts to a poor attempt at papering an ownership interest where none exists.[56]

40. In its February 5 Answer, Tri-State represents that Mieco is a for-profit corporation, incorporated in Delaware on April 3, 1984. According to Tri-State, Mieco is a subsidiary of a for-profit corporation, Marubeni America Corporation, and Marubeni America is, in turn, the largest subsidiary of Marubeni Corporation, a foreign for-profit corporation. Tri-State explains that Mieco's two shareholders are Marubeni America Corporation and Marubeni Corporation. Tri-State states that Mieco markets natural gas nationwide and is a major supplier of gas to Tri-State's power plants. Tri-State states that neither Mieco, nor Marubeni America Corporation, nor Marubeni Corporation, is a federal or state government entity or an electricity cooperative. Accordingly, Tri-State argues that Mieco is not exempt under FPA section 201(f).[57]

41. Tri-State rejects protesters' arguments that the Mieco Membership Agreement should be disregarded as a sham business transaction, primarily under *Marin*. Tri-State distinguishes its business transaction from the one at issue in *Marin*, where a company sought to escape state regulatory jurisdiction by transferring part of its operations to a

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[54] Sierra Club Protest at 14, 16.

[55] United Power Protest at 11-12 (citing *Marin*, 356 U.S. 412, 415-416 (1958)).

[56] *Id*. at 12-13 (citing, *inter alia*, *U.S.I. Properties Corp. v. M.D. Constr. Co., Inc.,* 860 F.2d 1, 6 (1st Cir. 1988); *Prudential Oil Corp. v. Phillips Petroleum Co.*, 546 F.2d 469, 477 (2d Cir. 1976); *Luzenac Am., Inc.*, 121 FERC ¶ 61,084 (2007), *order on reh'g*, 123 FERC ¶ 61,027 (2008)).

[57] Tri-State February 5 Answer at 8-9.

subsidiary that was a corporate shell without property or function.[58] Tri-State adds that the Commission has only found sham transactions where a party is a paper shell company, there is self-dealing, or the transaction was not negotiated at arm's-length.[59] In contrast, Tri-State represents that Mieco is an entirely independent company in a longstanding commercial relationship with Tri-State. Mieco derives substantial revenue from its sales of gas to Tri-State, and Tri-State relies heavily on Mieco's gas to power the generation it needs to supply its Utility Members' requirements. Tri-State claims that the Mieco Membership Agreement was negotiated at arm's-length, and it adjusts and strengthens that vital commercial relationship by enabling Mieco to participate as a Member in Tri-State and providing it an additional incentive (through the award of patronage capital) to supply gas to Tri-State at rates that benefit Tri-State and its Utility Members.[60]

42. Although Tri-State acknowledges that becoming subject to the Commission's jurisdiction was also a motivation, it argues that having multiple motivations does not make the underlying transaction a sham. Tri-State represents that the Commission has found that it is "not unusual, much less unlawful . . . to structure transactions either to qualify for regulation for one entity or to avoid regulation by another."[61] Tri-State also disputes protesters' argument that the Mieco Membership Agreement should be deemed a sham because Tri-State reserved an option to terminate it if Tri-State's efforts to become subject to the Commission's jurisdictional failed. Tri-State represents that it does not intend to exercise that option, which will expire by its own terms when the Commission affirms its jurisdiction over Tri-State. Further, section 4.3 of the Mieco Membership Agreement expressly provides that if Tri-State were to exercise its termination option, Mieco's accrued rights as a co-owner of Tri-State would be preserved. Tri-State acknowledges that the parties could terminate the relationship in the future, but that that is no basis to reject jurisdiction. Moreover, Tri-State claims that its attempts to become subject to Commission jurisdiction have come at great expense and effort, and represent part of its long-term planning.[62]

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[58] *Id*. at 19 (citing *Marin*, 356 U.S. at 418).

[59] *Id.* (citing *Crude Co. v. FERC*, 923 F. Supp. 222 (D.D.C. 1996); *FERC v. City Power Mktg., LLC*, 199 F. Supp. 3d 218 (D.D.C. 2016); *Seaway Crude Pipeline Co., LLC*, 154 FERC ¶ 61,070 (2016)).

[60] *Id.* at 19-20.

[61] *Id.* at 20 (citing *KN Wattenberg Transmission, LLC v. Pub. Serv. Co. of Colorado*, 83 FERC ¶ 61,285, at 62,184 n.25 (1998) (*KN Wattenberg*)).

[62] *Id.* at 20-21.

43. In its answer, United Power maintains that the transaction is a sham. United Power argues that under *Marin*, Mieco's ownership of Tri-State constitutes an attempt to avoid state regulation.[63] United Power cites to two exhibits in which Tri-State admits that it is seeking to become subject to Commission jurisdiction.[64] United Power disputes Tri-State's reliance on *KN Wattenberg* for the proposition that the Commission often allows transactions designed to change jurisdictional status, noting that the Commission does not allow transactions "when they are contrary to the public interest and inconsistent with the underlying purpose of statutes effecting a federal scheme of regulation."[65] United Power argues that, under that standard, the Commission should find that it is a sham of a transaction that would upend the entire regulatory regime under which Tri-State operates. United Power argues that the transaction necessarily harms Tri-State's existing members by violating Tri-State's own governing documents and diluting legitimate members' ownership interests for no value in return other than being regulated by the Commission.[66]

44. United Power disputes Tri-State's claims that this arrangement is legitimate and beneficial to members because Mieco provides Tri-State gas at below index rates. United Power argues that Tri-State did not provide any contract or indicate any obligation that Mieco has undertaken to provide Tri-State gas at below-index rates, nor did it represent that this arrangement or its gas prices were lowered as a result of the arrangement. United Power is also concerned that the Mieco Membership Agreement's patronage capital allocation methodology also contemplates what would happen if Tri-State incurs some kind of unexplained losses due to the Mieco membership. United Power claims that if there were any value to Mieco, one would expect that Mieco would have intervened in this proceeding or, more appropriately, filed comments defending the arrangement. United Power argues that there is simply no economic justification for the addition of Mieco as a member or Tri-State's allocation of patronage capital to Mieco and that it is a sham transaction for the express and sole purpose of escaping Colorado PUC regulation in violation of the Supreme Court's precedent under *Marin.*[67]

45. Similarly, La Plata notes, *inter alia*, that notwithstanding the stated purpose of Tri-State's existence, set forth in Tri-State's Articles of Incorporation, and notwithstanding

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[63] United Power Answer at 7 (citing *Marin*, 356 U.S. at 415).

[64] *Id*. at 7-8 (citing Tri-State February 5 Answer, Ex. F1 at 17; United Power Protest, Ex. UPC0001).

[65] *Id.* at 8 (citing *KN Wattenberg*, 83 FERC at 61,285).

[66] *Id.*

[67] *Id.* at 8-9.

its core functions, Tri-State's non-Utility Members do not take wholesale electric service from Tri-State. La Plata argues that, thus, the non-Utility Members with Tri-State are relationships of pure convenience and contrivance. La Plata argues that non-Utility Members cannot be considered owners of Tri-State for the sole purpose of eliminating a jurisdictional exemption.[68]

46. Sierra Club maintains that Tri-State's jurisdictional arguments fail for several reasons. Sierra Club asserts that Tri-State provides no documents concerning the nature and activities of Mieco or Mieco's ownership structure, resulting in an incomplete record. Sierra Club notes that Tri-State submitted with its answer unauthenticated screenshots of webpages rather than actual legal documents, such as Mieco's Articles of Incorporation. Sierra Club argues that these screenshots do not provide a factual basis for determining that Mieco could not be a qualifying electric cooperative subject to exemption under FPA section 201(f). Sierra Club asserts that Tri-State should be required to produce corporate documents showing the nature and activities of Mieco's owners, authenticated by affidavit.[69]

ii. Jurisdictional Issues Under FPA Section 201(f)

47. Wheat Belt states that it anticipates that some interested stakeholders will oppose the Petition on the grounds that Tri-State admitted a non-exempt Member solely to evade state regulation.[70] While Wheat Belt supports Tri-State's requested declarations, Wheat Belt contends that it is important to recognize that the rationale underlying Tri-State's change in jurisdictional status has no bearing on whether the Commission has jurisdiction. Wheat Belt further explains that the FPA imposes a "'legalistic or governmental' test" to determine whether the Commission has jurisdiction, and the only question that test considers is whether Tri-State remains eligible for the exemption under FPA section 201(f). Wheat Belt argues that given that Tri-State is no longer wholly

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[68] La Plata Protest at 22-23.

[69] Sierra Club Answer at 5.

[70] Wheat Belt Comments at 5 (citing Docket No. ER19-2440, et al., Motion for Leave to Answer and Answer of Guzman Energy, LLC at 5-6 (Sept. 27, 2019) ("In the middle of this Colorado PUC proceeding, Tri-State announced its intention to explore adding a new member in order to become FERC jurisdictional, notwithstanding Tri-State's assertion mere months before that Tri-State had no intention of pursuing FERC jurisdiction."); Docket No. ER19-2440, et al., Protest of Sierra Club at 4 (Aug. 23, 2019) ("Tri-State is now seeking to intentionally add at least one new member that is not exempt under [FPA] section 201(f), which will remove Tri-State from the statutory exception and trigger Commission jurisdiction.")).

owned by entities that are themselves exempt under FPA section 201(f), the only answer to that question is "no." Wheat Belt asserts that the jurisdiction inquiry ends there.[71]

48. The Colorado PUC contends that whatever interest Mieco holds in Tri-State looks nothing like the type of ownership the Commission has recognized as relevant in *In the Matter of Nebraska Power Co.*[72] and *DMEA.*[73] The Colorado PUC argues that Mieco's current financial ownership interest is minimal and that until Mieco is allocated patronage capital the Commission cannot determine whether Mieco is an owner of Tri-State.[74] The Colorado PUC argues that investigation is needed to determine whether Mieco owns Tri-State for purposes of determining whether the FPA section 201(f) exemption continues to apply to Tri-State and that the Commission risks taking action outside of its Congressionally granted jurisdiction if it does not open such investigation or dismiss Tri-State's filings to allow the proceedings before the Colorado PUC to conclude.[75]

49. Sierra Club argues that Tri-State has not established that Mieco is an FPA section 201(f) exempt entity. Sierra Club notes that Tri-State provided no factual evidence to back up its claim that Mieco "markets natural gas nationwide" and is "neither a cooperative nor a public power district."[76]

50. Sierra Club explains that a key issue in interpreting the meaning of FPA section 201(f) is the meaning of the phrase "wholly owned" and that the Commission has principally addressed the question of the meaning of "wholly owned" in the context of for-profit stock corporations.[77] Sierra Club states that in those cases, holders of common stock counted as owners under FPA section 201(f), but holders of preferred stock may or may not, depending on their voting power and control. Consequently, Sierra Club

[71] *Id.* at 5-6.

[72] 5 FPC 8 (1946) (*Nebraska*).

[73] Colorado PUC Protest at 26.

[74] *Id.* at 24.

[75] *Id.* at 27.

[76] Sierra Club Protest at 11-12 (quoting Petition at 10, 14).

[77] *Id.* at 8 (citing *Enron*, 83 FERC ¶ 61,032; *Nebraska,* 5 FPC 8).

believes that *DMEA*, which dealt with ownership of Tri-State, a non-profit cooperative without any stock or shareholders, provides the clearest precedent.[78]

51. Multiple protesters agree that the three factors discussed in *DMEA* provide the framework for analyzing Tri-State's Petition, and that Tri-State has not demonstrated that Mieco meets any of the requirements that would make Tri-State exempt from Commission jurisdiction under FPA section 201(f).[79] Protesters represent that, under *DMEA*, a utility qualifies for FPA section 201(f) if they fulfill three criteria: [1] "each member has a patronage account representing each member's financial ownership interest in the corporation, i.e., the amount a member pays for energy which exceeds Tri-State's cost of service," [2] "upon dissolution each member is entitled to an equitable share of the assets," and [3] "each member has a vote in Tri-State's operations."[80]

52. Protesters first dispute whether Mieco's patronage account has a balance that represents ownership, or whether the sale of natural gas to Tri-State would create patronage capital under the first "factor." La Plata states that Mieco has no patronage capital, only rights to acquire patronage capital.[81] United Power asserts that Mieco has no present ownership interest in Tri-State, and that the mere existence of the Mieco Membership Agreement cannot create ownership. United Power contends Mieco has, at best, a future interest that does not amount to an option, as Mieco has no control over whether it will receive an equity stake in Tri-State or not, because the Board has complete discretion to pay any margins in cash.[82]

53. Sierra Club argues that even if Mieco were a valid member of Tri-State, Tri-State cannot demonstrate that Mieco fulfils any of the *DMEA* ownership criteria for a cooperative to qualify as an owner for FPA section 201(f) purposes. Regarding the first criterion—that "each member has a patronage account representing each member's financial ownership interest in the corporation, i.e., the amount a member pays for energy which exceeds Tri-State's cost of service"—Sierra Club argues that the Mieco Membership Agreement does not provide a basis for concluding that Mieco has a patronage-based financial ownership interest. Sierra Club adds that it is unclear how the amounts of patronage Mieco earns are calculated, that there is no assurance that any patronage will be paid, and that no documentation exists to show that this is anything

[78] *Id.* at 8-9.

[79] *DMEA*, 151 FERC ¶ 61,238 at P 29.

[80] *Id.*

[81] La Plata Protest at 10 (citation omitted).

[82] United Power Protest at 10-11, 14-15.

other than a discretionary payment constituting a financial ownership interest.[83] United Power speculates that Mieco might be earning patronage capital by charging less for gas than market rates to create "margin," but notes that would only reduce expenses. The effect could be more margin, but it is not due to revenue, but rather to reduced expenses (the same effect that occurs when non-Member revenue is deducted from expenses). Thus, United Power argues that other members would see reduced patronage while paying Mieco the profit on its "contribution" to margin.[84] Sierra Club also questions whether Tri-State's Bylaws bar it from allocating patronage in the way described in the Mieco Membership Agreement, because the Bylaws allocate patronage based on the amount by which member payments for wholesale electricity exceed the sum of "operating costs and expenses properly chargeable against the furnishing of electric power and energy" plus any amounts needed to offset prior losses or stabilize reserves. However, Sierra Club notes that the Bylaws provide no method of calculating patronage based on a member's sale of natural gas. Sierra Club further notes that Mieco's patronage capital allocation had not occurred at the time of filing.[85]

54. In its answer, Tri-State asserts that Mieco has accrued patronage capital by selling gas to Tri-State below index prices, thereby benefiting Tri-State and its Utility Members. When gas is sold below margin, Mieco and the Utility Members split the savings 50-50, with the savings allocated to their patronage capital accounts. While Tri-State represents that the amount of patronage capital Mieco owns should be immaterial under FPA section 201(f), it notes that its preliminary determination[86] indicates that Mieco accrued $167,139.59 of patronage capital from September 3 to December 31, 2019. Tri-State argues that this represents a real and substantial ownership interest, and that it is more than three Utility Members accrued during an entire year.[87]

55. Tri-State notes that Article VII section 3 of its Bylaws specify how patronage capital is calculated for Utility Members, but that the Bylaws do not bar the creation of other methods of distributing patronage capital. Tri-State explains that Mieco's patronage capital allocation will be assessed annually under the same two-step process used by Utility Members: (1) Tri-State calculates its net margin; then (2) allocates that

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[83] Sierra Club Protest at 17-18 (citing *DMEA*, 151 FERC ¶ 61,238 at P 29).

[84] United Power Protest at 16-17.

[85] Sierra Club Protest at 18-19 (citing Tri-State Bylaws, at art. VII, § 3 (contained in Petition, Ex. E)); La Plata Protest at 11-12.

[86] Tri-State represents that this determination is subject to audit, and to final Board approval of Tri-State's financial statements, which is expected in early March 2020.

[87] Tri-State February 5 Answer at 12-13.

margin, as patronage, on an equitable basis among its members. Tri-State claims the Board has not opted to distribute Mieco's patronage capital as cash.[88]

56. In its answer, United Power argues that Tri-State fails to demonstrate that the patronage capital allocations submitted as Exhibit E1 are a current equity interest that would establish Mieco is an owner of Tri-State. United Power argues that the figures are subject to audit and would need to be approved by the Tri-State Board no earlier than the March 10-11, 2020 Board Meeting. United Power represents that Tri-State describes at most a future ownership interest that would not indicate ownership triggering the Commission's jurisdiction unless and until the Tri-State Board first approves a legitimate patronage capital allocation. United Power avers that Mieco's ownership interest still remains zero.[89]

57. United Power also states that Tri-State's method of allocating patronage capital to Mieco is inconsistent with Tri-State's Bylaws. United Power claims that Article VII, section 3 of the Bylaws explains how patronage capital is allocated:

> In the furnishing of electric energy the Corporation's operations shall be so conducted that *all members* will through their patronage furnish capital for the Corporation. In order to induce patronage and to assure that the Corporation will operate on a nonprofit basis, [Tri-State] is obligated to account on a patronage basis to *all its members* for all amounts received and receivable from the furnishing of electric power . . . .[90]

58. United Power notes that the Bylaws contain no other method of allocating patronage capital. Consequently, United Power objects to Tri-State's argument that the Bylaws do not preclude other methods of allocating patronage capital, given the fact that Article VII, section 3 explicitly refers to "all members." United Power argues that it could instead refer to all utilities or cooperatives, but does not. United Power avers that members receive patronage capital through patronage to Tri-State, which requires that all members' patronage capital is accrued through patronage. United Power adds that, even under the Mieco Membership Agreement, allocation of patronage capital is a

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[88] *Id.* at 13-16. However, it is unclear when this decision must be made—it may happen in early March when the Board gives final approval of the financial statements.

[89] United Power Answer at 3-4.

[90] *Id.* at 4 (emphasis supplied by United Power).

discretionary determination made by the Board, and that determination has not been made yet.[91]

59. United Power avers that Mieco's sales of natural gas to Tri-State cannot secure any debt-financing, because they are not a stream of revenue to Tri-State. United Power states that, unlike the "true" owners, Mieco does not contribute any capital to Tri-State. United Power and La Plata claim that Mieco's earning of patronage capital is precisely the opposite of how other Tri-State owners earn patronage capital. United Power infers that, because Mieco likely sells natural gas to Tri-State at a profit, it already earns a margin on the sales. Other Tri-State members thus not only will pay Mieco a profit on the gas it sells to them, but they also will lose a portion of their own patronage capital to Mieco. In effect, United Power argues that Mieco will be paid twice—once for selling quantities of natural gas to Tri-State, and once for participating as a sham "owner" to claim FERC jurisdiction.[92]

60. Protesters also discuss the next criterion of ownership under *DMEA*, that "upon dissolution, each member is entitled to an equitable share of the assets."[93] Although protesters acknowledge that the Mieco Membership Agreement provides that, "upon the dissolution of Tri-State . . . any cash remaining shall be used to pay out any patronage credits that Mieco may have on a pro-rate basis with all other patronage credits held by members," they argue that if Mieco's patronage account has never actually been funded, Mieco's ownership interest would be zero upon dissolution.[94]

61. As to the third *DMEA* criterion, "each member has a vote in Tri-State's operations," protesters also dispute Tri-State's jurisdictional status. The Colorado Commission argues that the Commission should not assume that Mieco's membership in Tri-State make it an owner within the meaning of FPA section 201(f), because Mieco's lack of voting rights and exclusion from the Board do not make Mieco equivalent to other members.[95] Sierra Club represents that Tri-State is controlled by its Board, on which each of the 43 Utility Members has a seat, and that the Board meets at least 12 times a year to vote on the decisions needed to manage Tri-State's operations. Sierra Club notes

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[91] *Id.* at 4-6.

[92] *Id.* at 16; La Plata Protest at 8-10.

[93] *DMEA*, 151 FERC ¶ 61,238 at P 29.

[94] Sierra Club Protest at 19-20 (citing Mieco Membership Agreement, § 3.2 (contained in Petition, Ex. G)); La Plata Protest at 12-13; Colorado PUC Protest at 25; United Power Protest at 18.

[95] Colorado PUC Protest 25-26.

that, by contrast, Mieco is excluded from having a seat on the Board, and that Mieco's Membership Agreement restricts Mieco's voting rights further.[96]

62. Protesters aver that these voting rights do not provide Mieco with any meaningful control over Tri-State's operations. Protesters note that Tri-State's Bylaws only require Tri-State to hold one members meeting annually and that other than a decision to dispose of or encumber all or any substantial portion of Tri-State's property, the Board is not required to seek members' approval for any business decision. Sierra Club states that beyond the realm of business operations, members also have the right to vote on amendments to the Bylaws, amendments to the Articles of Incorporation, and on whether to allow classes of members other than Utility Members to have a seat on the Board. Protesters argue that such issues have only a tangential relation to day-to-day business operations such as the decision on whether to enter into a particular contract or to authorize a particular capital expenditure.[97]

63. Sierra Club maintains that the Commission's analysis in *DMEA* of the voting powers of cooperative members is rooted in and is consistent with *Nebraska's* analysis of the voting powers of holders of preferred stock. Sierra Club states that an assessment of ownership for purposes of FPA section 201(f) requires "looking through form to substance" to examine whether or not the ostensible owners of an entity show any ability to "control management and operations" of the entity. Sierra Club contends that, in *Nebraska*, the Federal Power Commission (FPC) found that the preferred stockholders were not owners because it appears impossible for the preferred stockholders at any time to control the management and operation of the applicant corporation.[98] La Plata adds that in *DMEA* the Commission contemplated voting rights on the Board and, without an elected or appointed representative, Mieco is not an owner of Tri-State.[99]

64. Sierra Club concludes that Mieco's membership cannot fulfill the third *DMEA* criterion of ownership, a "vote in Tri-State's operations."[100] United Power adds that, in *Nebraska*, the FPC concluded that a corporation with 1,000,000 shares of common stock owned indirectly by governmental entities and 74,523 shares of preferred stock owned by the broader public was "wholly owned" by the governmental entities. United Power

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[96] Sierra Club Protest at 20-21.

[97] *Id.* at 21-22 (quoting Mieco Membership Agreement, at § 3.4 (contained in Petition, Ex. G)); United Power Protest at 18-19; La Plata Protest at 13-14.

[98] Sierra Club Protest at 10 (citing *Nebraska*, 5 FPC at 19-21).

[99] La Plata Protest at 14 (citing *DMEA*, 151 FERC ¶ 61,238 at P 29 & n.34).

[100] Sierra Club Protest at 22.

represents that the FPC reached this conclusion by examining which entities held functional control of the corporation.[101]

65. La Plata argues that Tri-State misinterprets *Enron*, which La Plata asserts supports a finding that Tri-State remains exempt from the Commission's jurisdiction.[102] La Plata argues that *Nebraska* and *Enron* can be squared with *DMEA*, and that all three orders underscore the need for a multi-factor examination to determine ownership or what it means for a cooperative to be "wholly owned" under FPA section 201(f).[103] La Plata argues that Tri-State has not shown how Mieco will hold any equity interest or accrue any patronage capital in Tri-State and that, even if Mieco held patronage capital, it would not satisfy the other criteria in *DMEA*.[104]

66. United Power notes that, in *Enron*, the Commission cited *Nebraska* with approval. United Power represents that in *Enron*, the Commission concluded that Amtrak was not wholly owned by government entities, notwithstanding that 100 million shares of Amtrak's preferred stock were owned by the United States, as 9.4 million shares of its common stock owned by private railroads. United Power claims that the Commission relied in part on *Nebraska's* rationale that Congress did not intend for "wholly owned" to include ownership of preferred stock, demonstrating that control is the relevant inquiry. United Power argues that it is control that matters in assessing whether an entity is "wholly owned" by a set of owners, or whether there is a different controlling interest that amounts to ownership. United Power concludes that, because Mieco has no control of, and no voice in, Tri-State's day-to-day business affairs, and no say even in matters "considered by" the Board, Mieco's interest is far more similar to the preferred stock in Nebraska.[105] Sierra Club asserts that Tri-State is mistaken in its assertion that *Enron* is relevant on the voting rights issue here, noting that that case involved 201(f) ownership in a for-profit stock corporation rather than a non-profit cooperative.[106]

67. La Plata argues that Commission precedent belies this formalistic approach, noting that the Commission has disclaimed jurisdiction over entities that engaged in activities

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[101] United Power Protest at 19 (citing *Nebraska*, 5 FPC at 20).

[102] La Plata Protest at 15-16 (citing *Enron*, 83 FERC ¶ 61,032).

[103] *Id.* at 16 (citation omitted).

[104] *Id.* at 18.

[105] United Power Protest at 20-21 (citing *Nebraska*, 5 FPC 8; *Enron*, 83 FERC ¶ 61,032).

[106] Sierra Club Answer at 13.

that would otherwise be subject to Commission's jurisdiction where the entity did not exercise control over the relevant activities.[107] La Plata asserts that in multiple contexts the Commission examines the substance of the relationship between the relevant parties to determine whether an entity is subject to the Commission's jurisdiction or if the Commission should disclaim jurisdiction.[108]

68. Gladstone asserts that Tri-State's claim that it is no longer an exempt entity pursuant to FPA section 201(f) is based upon its flawed reading of Commission precedent.[109] Gladstone state that Tri-State relies on *Enron*, in which the Commission found that ownership of common stock by private companies was sufficient to demonstrate that an entity is not exempt under FPA section 201(f).[110] Gladstone argues that because Tri-State does not issue stock to any of its members, admitting Mieco as a new member does not confer any common stock to a private company that is sufficient to compel a finding that Tri-State is no longer exempt under FPA section 201(f) under that precedent.[111] Gladstone also notes that the Mieco Membership Agreement significantly departs from Tri-State's Bylaws by: characterizing the parties' relationship as that of "independent contractors," rather than of "cooperative corporation and member";[112] stating that Mieco will not have voting rights or sit on a Board Committee or Member Advisory Council;[113] providing Tri-State with the right to terminate Mieco's membership without providing Mieco with the opportunity to cure the grounds for such termination as provided by—and on the basis of occurrences not provided for—in the Amended and Restated Bylaws;[114] stating that Tri-State will allocate capital credits to Mieco based on the sales of natural gas that it makes to Tri-State, rather than based on said member's monetary payments to Tri-State for electric energy;[115] and affording Tri-State the option of distributing all or a portion of Tri-State's net margins deemed allocated to Mieco as

[107] La Plata Protest at 19-20.

[108] *Id.* at 21.

[109] Gladstone Protest at 5.

[110] *Id.* at 5, 17-18 (citing *Enron*, 83 FERC ¶ 61,032).

[111] *Id.* at 5, 18.

[112] *Id.* at 19 (*comparing* Petition, Ex. G, Mieco Membership Agreement, § 5.1 *with* Petition, Ex. E, Tri-State Bylaws, at art. VII, § 1)).

[113] *Id.* (citing Petition, Ex. G, Mieco Membership Agreement, § 3.4).

[114] *Id.* at 21.

[115] *Id.* at 24.

cash, instead capital credits.[116] Gladstone, therefore, disagrees with Tri-State's claims that granting membership to Mieco meets the standards set by the Commission to show private ownership or control of the utility which would support a finding that an otherwise exempt entity no longer qualifies for exemption under FPA section 201(f).[117]

69. United Power also urges the Commission to reject an interpretation of FPA section 201(f) where "wholly owned" means 100% ownership, because a corporation could opt in and out of Commission rate regulation simply by buying and selling pennies of ownership shares to any party it pleases or by entering into transactions with no true business purpose other than to allow it to select federal jurisdiction when convenient. United Power argues that a generation and transmission cooperative like Tri-State could strategically—and without any substantive impact on the actual operations and ownership structure of the cooperative—change its ownership structure to evade Commission and state jurisdiction at will. United Power believes that Congress could not have intended such a jurisdictional shell game, and that reading "wholly" with a grain of logic prevents that type of strategic gaming because only cooperatives that have made real and material changes to their ownership structure would become subject to regulation under the FPA.[118]

70. In its February 5 Answer, Tri-State urges the Commission to reject protesters' arguments that Tri-State is no longer "wholly owned" by FPA section 201(f) exempt Utility Members, either because "wholly" means "substantially wholly" or implicates some form of control or influence test, or because the Mieco Membership Agreement is allegedly a sham. Tri-State argues that wholly means 100%, which it claims is consistent with the plain language of the statute and *Enron*, which rejected any kind of control or influence test. Tri-State adds that *Enron* found that the value of the co-owner's share is irrelevant, noting: "[s]ection 201(f) turns on who owns a corporation's stock, not how much the stock is worth."[119]

71. Tri-State claims that the Commission explicitly relied on a "plain language" reading of FPA section 201(f) in *DMEA* and *Enron*, and that it should reject protesters' arguments to the contrary. Tri-State argues that FPA section 201(f) is a narrow exemption that should be narrowly construed. Moreover, it argues that protesters have

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[116] *Id.* at 25.

[117] *Id.* at 5.

[118] United Power Protest at 21.

[119] Tri-State February 5 Answer at 17 (citing *Enron*, 83 FERC ¶ 61,032 at 61,067).

not provided a reasonable framework for assessing how much ownership would be enough.[120]

72. In its answer, La Plata argues that Mieco is not an actual "owner" of Tri-State for purposes of a jurisdictional inquiry. La Plata asserts that Tri-State remains wholly owned by entities that are themselves exempt from Commission jurisdiction and is therefore exempt from FPA Part II jurisdiction. La Plata contends that the Commission has looked to the substance of relationships and transactions to determine whether an entity or transaction falls under FPA jurisdiction and that the Commission has disclaimed jurisdiction when appropriate. La Plata claims that, for example, the Commission has recognized that there are different levels of ownership interests, and the Commission's regulations do not consider limited rights held by passive investors to constitute "voting securities." Therefore, these passive investors are not considered affiliates of regulated public utilities, and do not need to be included in applicable reporting requirements.[121]

c. Determination

i. Preliminary and Threshold FPA Section 201(f) Issues

73. Before turning to the question of whether Tri-State is no longer an exempt entity under FPA section 201(f), we will address a number of preliminary and threshold arguments raised by protesters in opposition to the Petition.

74. We first address the argument made by the Colorado PUC that the Commission should not issue an order on the Petition until the Colorado PUC's review is completed, because a rushed Commission order would create additional confusion or interfere in pending state litigation.[122] While we recognize that proceedings are ongoing before the Colorado PUC, we conclude that ruling on the Petition is appropriate at this time. Critically, we note that Tri-State and protesters have also addressed Tri-State's jurisdictional status at length in the companion FPA section 205 filings that we are concurrently addressing in other orders. Under the FPA, the Commission has a statutory obligation to act on those filings, and we conclude that action on the Petition will provide needed clarity to all parties involved in these proceedings.

75. Protesters also raise several other issues regarding Mieco's membership in Tri-State: (1) did the transaction require state regulatory approval, or otherwise violate

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[120] *Id.* at 18.

[121] La Plata February 5 Answer at 9.

[122] Colorado PUC Protest at 28-29.

Colorado statutes and regulations; (2) did the transaction require Commission regulatory approval; (3) did Mieco's admission as a member violate Tri-State's Articles of Incorporation and Bylaws; and (4) did Mieco's admission as a member constitute a sham transaction. As explained below, we do not believe that any of these issues prevent us from reaching the merits of the Petition.

76. First, we take no position on the question of whether Mieco's membership in Tri-State required state regulatory approval or otherwise violated Colorado statutes and regulations.[123] Rather, we consider Tri-State's jurisdictional status and the related issues raised in the Petition based solely on the record before us, and we decline to resolve the Colorado law issues raised by various protesters, which we believe are more appropriately handled in state fora. As a result, however, we note that the resolution of the pending Colorado PUC proceedings, or other litigation concerning Colorado law issues, could be relevant to Commission proceedings in the future, and we would consider relevant findings at that time.

77. The Colorado PUC and Sierra Club also argue that Tri-State failed to prove that Commission approval under FPA section 203(a)(2) was not required for the transaction.[124] We find that such a showing is not necessary for us to reach the merits of the Petition, and note that neither the Colorado PUC nor Sierra Club provide evidence to suggest that such authorization is required.[125]

78. The Colorado PUC also argues that Tri-State failed to comply with FPA section 205(c), because Tri-State did not file the Mieco Membership Agreement with the Commission before Mieco joined Tri-State.[126] However, the filing obligation reflected in FPA section 205(c) applies only to public utilities, and no party claims that Tri-State was a public utility under the FPA *prior* to Mieco's joining. Thus, even if the Mieco Membership Agreement did ultimately need to be on file, Tri-State had no obligation to file it for Commission review prior to executing it. United Power similarly argues that

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[123] For example, Sierra Club and La Plata allege that Mieco's membership in Tri-State violates various portions of the Colorado Revised Statutes governing cooperatives, including uniform treatment of members.

[124] Colorado PUC Protest at 19; Sierra Club Answer at 14.

[125] Further, Exhibits E and E1 to Tri-State's February 5 Answer show that the preliminary value of the transaction was approximately $160,000. This amount is below the $10 million threshold for transactions that require Commission authorization under FPA section 203(a)(2).

[126] Colorado PUC Protest at 19.

the Mieco Membership Agreement is an unfiled jurisdictional agreement.[127] Notably, our ability to address the merits of the Petition does not depend on whether that agreement is on file because that is a separate question from whether that agreement, and Mieco's membership in Tri-State, results in Tri-State being subject to the Commission's jurisdiction. Furthermore, we agree with Tri-State that FPA section 205 does not require Tri-State to file the Mieco Membership Agreement. Under the Commission's "rule of reason," public utilities must file practices "that affect rates and service significantly, that are realistically susceptible of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous."[128] The Mieco Membership Agreement simply provides the method for creating, allocating, and distributing patronage capital between Tri-State and Mieco. Therefore, it does not significantly affect rates and services and does not need to be on file.

79. We also find that, based on the record before us, the Mieco Membership Agreement does not violate various aspects of Tri-State's Articles of Incorporation and Bylaws. In particular, we note that Article I, section 2 specifies that the Board may establish new classes of membership with different rights and preferences, and, in this instance, it did so.[129] Tri-State and Mieco executed the Mieco Membership Agreement

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[127] United Power Protest at 22-23.

[128] *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985); *see* 16 U.S.C. § 824d(c) (requiring utilities to file practices affecting jurisdictional rates and charges); 18 C.F.R. § 35.1(a) (2019) (requiring the filing of "full and complete rate schedules and tariffs" that "clearly and specifically set[] forth" practices affecting jurisdictional rates); *Demand Response Coal. v. PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,061, at P 17 (2013) ("The FPA requires all practices that significantly affect rates, terms and conditions of service to be on file with the Commission, and these practices must be included in a Commission-accepted tariff rather than other documents.").

[129] On July 9, 2019, Tri-State's Board voted to approve Article I, section 2. Petition, Ex. F, Resolution; Tri-State February 5 Answer, Ex. F, Affidavit of Julie Kilty. Article I, section 2 provides:

> Notwithstanding any other provision of these Bylaws to the contrary, the Board of Directors may establish one or more classes of membership in addition to the existing all requirements class of membership…. Members may choose their class of membership subject to any terms and conditions of membership and rights and preferences and limitations on the rights and preferences of the members of each additional class of membership as the Board of Directors establishes from time to time. Such rights and preferences and

pursuant to this authority, through which Mieco has become a Non-Utility Member with different rights and obligations than Tri-State's traditional Utility Members.[130]

80. Finally, protesters urge the Commission to treat the Mieco Membership Agreement as a "sham" transaction under *Marin*, because they assert that Tri-State's major motivation is to become subject to Commission jurisdiction. In *Marin*, the Interstate Commerce Commission approved the transaction under its statutory authority to grant "approval . . . for any carrier . . . to acquire control of another."[131] Under the Interstate Commerce Act, the Court found that the Interstate Commerce Commission's approval of the transaction as an acquisition was inappropriate, because the creation of a new subsidiary could not meet that statutory definition of a carrier acquiring another carrier.[132]

81. We conclude that *Marin* is not relevant precedent here because the applicable provisions of the FPA and the record here are distinguishable from *Marin*. Unlike the provisions of the Interstate Commerce Act at issue in *Marin*, FPA section 201(f) uses binary language regarding ownership: Tri-State is either wholly owned by exempt entities, or it is not. To the extent that we need to evaluate under FPA section 201(f) whether Mieco's ownership constitutes a "sham" transaction, we are persuaded that Tri-State has provided a sufficient justification for the transaction. Although Tri-State's membership arrangement with Mieco is different than that with its Utility Members, Tri-State has adequately explained the commercial motivations underpinning that arrangement. Mieco and Tri-State had a pre-existing business relationship as supplier and consumer, and the tying of their relationship together through patronage capital appears to yield benefits for both parties. From a functional standpoint, selling gas below index prices is similar to Utility Members purchasing electric energy above Tri-State's costs, as both types of transactions generate a margin for Tri-State. And, both types of transactions benefit members through price certainty, supply/demand certainty, and patronage capital.

> limitations on the rights and preferences may differ between membership classes and may be different for individual members within an additional class of membership.

[130] As noted above in P 76, we decline to rule here on concerns raised by protesters regarding Tri-State's authority under Colorado law to create different membership classes.

[131] 356 U.S. at 418.

[132] *Id.* at 418-19.

ii. Jurisdictional Issues Under FPA Section 201(f)

82. As explained below, we conclude that Tri-State became a jurisdictional public utility under Part II of the FPA upon its admission of Mieco as a member on September 3, 2019.

83. Our inquiry here begins with the text of FPA section 201(f), which states that:

> No provision in this subchapter [*i.e.*, part II of the FPA] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one of more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.[133]

As relevant here, FPA section 201(f) is an exemption from the Commission's authority to regulate transmission service and wholesale electric sales in interstate commerce for entities that are "wholly owned, directly or indirectly," by other exempt entities that fall within the scope of FPA section 201(f)'s exemption. FPA section 201(f) does not expressly require that all ownership interests be of any particular value or design, or that such interests be comparable to those of other owners.

84. As Tri-State notes, the Commission has interpreted the language of FPA section 201(f) to determine whether an entity is wholly owned by exempt entities. When evaluating ownership under FPA section 201(f), the Commission undertakes a fact-specific approach that focuses on the underlying nature of the purported ownership interest. Recognizing that ownership can manifest itself in myriad ways, the Commission has not adopted formulaic tests, and has instead considered the totality of the circumstances surrounding a purported ownership interest.[134] Based on our consideration of the record before us, we conclude that Tri-State has demonstrated that Mieco's membership created an ownership interest in Tri-State, and that Mieco is not an entity exempt from FPA section 201(f). Accordingly, we grant Tri-State's Petition as to this

[133] 16 U.S.C. § 824(f).

[134] *Nebraska*, 5 FPC 8; *Enron*, 83 FERC ¶ 61,032; *DMEA*, 151 FERC ¶ 61,238.

issue and find that Tri-State is now, and since September 3, 2019 has been, a non-exempt jurisdictional public utility for purposes of Part II of the FPA.

85. First, Tri-State represents that under the Mieco Membership Agreement, since September 3, 2019, Mieco has continuously been earning patronage capital through its sales of natural gas below index prices. Consistent with the Mieco Membership Agreement, Tri-State's Bylaws, and Exhibits E and E1 to Tri-State's February 5 Answer, Mieco and Tri-State have engaged in transactions that generated patronage capital since September 3, 2019.[135]

86. In addition to allocation of patronage capital, other factors also support a finding that Mieco has an ownership interest in Tri-State. Unlike a non-owner, Mieco has rights to an equitable share of assets in the event of Tri-State's dissolution, similar to rights held by existing Utility Members. Furthermore, Mieco has a vote in Tri-State's operations tailored to its status as a non-Utility Member. Although these voting rights are different than those held by Utility Members, the Commission has not found that FPA section 201(f) requires that owners have equal levels of control to demonstrate ownership.[136] Finally, Tri-State explains that Mieco is a natural gas marketer that is not an exempt entity under FPA section 201(f),[137] and no party provides evidence to the contrary. Thus, we find that Tri-State has demonstrated that Mieco's rights are sufficient, in the FPA section 201(f) context, to establish that Tri-State has not been wholly owned by entities exempt under FPA section 201(f) since September 3, 2019.

87. Contrary to some protesters' assertions, our finding here is also consistent with Commission precedent. In *Enron*, Enron argued that Amtrak was wholly owned by the United States government for purposes of FPA section 201(f).[138] The Commission

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[135] Petition, Ex. E and Ex. G; Tri-State February 5 Answer, Ex. E and Ex. E1. According to Tri-State, common stock is the best analogy to patronage capital in the membership cooperative world, which cooperative members acquire through transactions they make with the cooperative that benefit the cooperative financially. Petition at 16-17. As noted, patronage capital is excess revenue, after operating expenses and costs, that is returned to cooperative members. *Sw. Power Pool Inc.*, 147 FERC ¶ 61,003 at P 8 n.16.

[136] The factors demonstrating Mieco's ownership are also consistent with *Nebraska*, in which the Commission emphasized examining the "character of the ownership." 5 FPC at 11. In *Enron*, the Commission found that the railroad companies qualified as owners despite having no control in Amtrak's operations. *Enron*, 83 FERC ¶ 61,032.

[137] Petition at 10.

[138] *Enron*, 83 FERC ¶ 61,032.

analyzed many facets of Amtrak, including its ownership structure. The Commission acknowledged that there were two categories of shareholders of Amtrak with vastly different rights: the United States government and four private railroad companies. Noting that the United States government exercised complete control over the operations of Amtrak, the Commission nonetheless found that Amtrak was not wholly owned by the United States government for purposes of FPA section 201(f) because of the approximately 10 million shares held by the private railroad companies.[139] Although the value of these shares had previously been assessed as worthless, the Commission did not require a showing that the shares had any particular value.[140] Like in *Enron*, our focus here is on the existence of ownership, not on the value of the ownership stake. Furthermore, even if that value was an essential showing, protesters here have not demonstrated that Mieco's ownership interest is valueless; instead, Tri-State has provided evidence that it has real value.[141]

88. We also disagree with protesters' assertion that *DMEA* compels a different outcome in this case. In *DMEA*, Tri-State Utility Member Delta-Montrose filed a petition for declaratory order asking for, among other things, a finding that Tri-State was not wholly owned by exempt cooperatives under FPA section 201(f). The Commission disagreed with Delta-Montrose's argument that, as a Tri-State Utility Member, Delta-Montrose is not an owner of Tri-State. The Commission found that:

> Tri-State is a non-profit cooperative corporation and, under the membership agreements, each member has a patronage account representing each member's financial ownership interest in the corporation, i.e., the amount a member pays for energy which exceeds Tri-State's cost of service, and upon dissolution each member is entitled to an equitable share of the assets, and each member has a vote in Tri-State's operations.[142]

While *DMEA* informs our discussion—as noted above, we find that Mieco is an owner of Tri-State based on similar considerations of patronage capital rights, equitable rights at

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[139] The Commission also noted that, under legislation, Amtrak was not to be considered an agent of the United States government. *Id.* at 61,067.

[140] *Id*.

[141] Further, these amounts do not appear insignificant. Tri-State represents that Mieco earned more patronage capital last quarter than three Utility Members earned all year. Tri-State February 5 Answer at 12-13.

[142] *DMEA*, 151 FERC ¶ 61,238 at P 29.

dissolution, and voting rights—protesters overreach in their attempts to apply *DMEA* as a test in the instant case. They assert that the three "factors" discussed in *DMEA* define what is necessary for a member to be considered an owner of Tri-State. However, in *DMEA*, the Commission simply identified three factors that demonstrated why Delta-Montrose, as an electric Utility Member of Tri-State, was also an owner of Tri-State. In making that finding, the Commission did not establish a threshold test for evaluating whether an entity has demonstrated ownership for purposes of FPA section 201(f).[143]

89. *DMEA* is also distinguishable from the instant case given that Delta-Montrose is a traditional electric Utility Member-owner of Tri-State. In analyzing ownership under FPA section 201(f), the Commission has specifically examined the nature of the ownership interest across different classes of owners. For example, in both *Nebraska*[144] and *Enron*, the Commission analyzed the different rights available to preferred and common stock owners to determine whether ownership attached for purposes of FPA section 201(f). We see no merit in protesters' arguments that, because the rights and obligations of Mieco are different than those of Utility Members, Mieco's interest in Tri-State does not constitute ownership under FPA section 201(f).

90. Protesters assert that Mieco's patronage sales of natural gas is a unique system for acquiring ownership, and they therefore urge us to find that such sales cannot be used to create an ownership interest in Tri-State. We disagree and conclude that these transactions are compatible with creation of an ownership under FPA section 201(f). Traditionally, ownership is created by the owners providing capital to a company in exchange for shares of stock. However, as the Commission recognized in *DMEA*, in the context of cooperative ownership, a traditional electric Utility Member may derive its ownership share from paying a margin above cost for the provision of electric energy. Mieco's ownership structure here is essentially the inverse: the value of Mieco's

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[143] *Id.*

[144] In *Nebraska*, the FPC examined the state regulatory framework and the nature of the ownership interest in the electric utility at issue to determine that the electric utility qualified for the FPA section 201(f) exemption. In that case, the State of Nebraska was in the process of implementing a policy of establishing public ownership of electric utilities in the Omaha area. The FPC found that once all of the common stock of a public utility was acquired by a quasi-public corporation (which was an instrumentality of a political subdivision of the State of Nebraska), that company was "wholly owned" by an exempt entity for purposes of FPA section 201(f). The FPC also found that Congress did not intend the words 'wholly owned' to include ownership of preferred stock, but rather the character of ownership exercised by holding companies in their domination of subsidiaries, notwithstanding the fact that large amounts of preferred stock were in the hands of the public. *Nebraska*, 5 FPC 8.

ownership share is derived from receiving less than market value for its sales of natural gas to Tri-State. In exchange for receiving less than the full market value of its sales, Mieco is allocated patronage capital. Consequently, we conclude that the same principle applies in both cases: an owner is giving up something of value in exchange for ownership.

91. Protesters also allege that Mieco has not yet been allocated patronage capital, and that the numbers provided are only estimates. They therefore urge us to find that, at a minimum, Mieco is not yet an owner of Tri-State. However, we find it significant that Mieco has a right, as do other members of Tri-State, to accrue patronage capital, and indeed, Tri-State demonstrates that Mieco has earned patronage capital since September 3, 2019. We find that Mieco's right to accrue patronage and actual accrual of patronage are sufficient to establish that Mieco's ownership interest in Tri-State began on September 3, 2019, and thus that Tri-State was no longer exempt under FPA section 201(f) at that time. FPA section 201(f) only requires us to analyze whether a utility is "*wholly* owned" by other exempt entities; it does not require any particular ownership structure or value.

92. Therefore, we also disagree with protesters' argument that a Board vote to allocate the patronage capital is a triggering event for ownership. The Board vote ultimately ratifies the final amount for the given year but is not a prerequisite to Mieco's accrual of patronage capital. We do not read FPA section 201(f) as requiring a Commission finding that ownership is not created until Tri-State's books close. Closing Tri-State's books represents the final annual quantification of how much patronage capital Mieco has earned, which as we noted, is not a requirement under FPA section 201(f).

2. Exclusive Jurisdiction and Preemption

a. Petition

93. Tri-State petitions for a declaration that the Commission has (and has had, since September 3, 2019) exclusive jurisdiction under FPA sections 205 and 206 over the terms, including exit charges, on which a Tri-State Member can terminate its full requirements Wholesale Service Contract with Tri-State and also that, therefore, any state PUC jurisdiction over complaints by Tri-State Members concerning such exit charges is preempted.[145] Tri-State asserts that the Commission has jurisdiction under FPA sections 205 and 206 to determine the just, reasonable, and nondiscriminatory terms on which a Tri-State member can terminate its Wholesale Service Contracts.[146] Tri-State contends

[145] Petition at 1.

[146] *Id.* at 20.

that the subject-matter of La Plata's and United's complaints before the Colorado PUC fall squarely within that exclusive jurisdiction.

94. First, Tri-State asserts that the issues related to their Wholesale Service Contracts involve the wholesale jurisdictional turf that Congress assigned to the Commission in the FPA and not the retail regulatory turf Congress reserved for the states.[147]

95. Second, Tri-State argues that specific issues La Plata and United Power raise—concerning the determination of "just, reasonable and nondiscriminatory" exit charges from a Wholesale Service Contract—are issues the Commission frequently exercises, jurisdiction to resolve.[148] Tri-State notes the Commission's broad mandate under section 205(a) to ensure that:

> All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable.[149]

Tri-State observes that the Commission is empowered to fulfill this mandate in two main related, but distinct, ways. Tri-State notes that the Commission enforces the filing requirement for non-exempt public utilities under FPA section 205(c), reviews the rates filed under the section 205(a) criteria, and enforces adherence to filed rates. Tri-State also notes that, separately and independently, under section 206(a), the Commission entertains and, when appropriate, provides relief for complaints alleging that a non-exempt public utility is failing to conduct its business in a "just, reasonable, and nondiscriminatory" manner.

96. Tri-State asserts that the exit charges at issue are encompassed within the Commission's mandate under FPA section 205(a) to ensure that electricity rates as well as "charges . . . in connection with" wholesale sales and "all rules and regulations affecting or pertaining to such rates or charges," are just and reasonable, and within the Commission's section 206(a) jurisdiction over complaints regarding "any rate, charge, or classification" pertaining to wholesale transmission and sales and "any rule, regulation,

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[147] *Id.* (citing *Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288, 1297 (2016) (*Hughes*)).

[148] *Id.* at 21 (quoting Ex. A, La Plata Complaint at 20; Ex. B, United Power Complaint at 24).

[149] *Id.* (quoting 16 U.S.C. § 824d(a)).

practice, or contract affecting such rate, charge, or classification."[150] Tri-State claims that these exit charges profoundly "affect" wholesale rates because without the exit charges, member withdrawals from Tri-State would leave remaining Utility Members cross-subsidizing withdrawing Utility Members by paying all the stranded costs. Tri-State asserts that, accordingly, the Commission regularly entertains and resolves disputes about exit charges for withdrawal from wholesale electric contracts.[151]

97. Tri-State asserts that the Commission's jurisdiction over the La Plata and United Power complaints does not depend on Tri-State's filing or the Commission's acceptance of Tri-State's Wholesale Service Contracts or other documents.[152] Tri-State contends that the Commission's overall mandate under section 205(a) does not limit the Commission's authority to just those rates and charges on file. Further, Tri-State asserts that the Commission possesses a distinct and independent duty under section 206(a) to provide appropriate relief for complaints alleging that a non-exempt public utility is failing to conduct its business in a "just, reasonable, and nondiscriminatory" manner. Tri-State observes that the plain language of section 206(a) does not mention filed rates.

98. Tri-State asserts that the Supreme Court case in *Colton* exemplifies this point.[153] Tri-State notes that in *Colton*, the Supreme Court affirmed the FPC's decision to assert jurisdiction under Part II of the FPA over a complaint challenging a public utility's rates charged to a wholesale purchaser of electricity, even though no relevant rates were on file at the time of the complaint. Tri-State argues that just as in *Colton*, and under the plain language of FPA sections 201 and 206, the Commission's jurisdiction over Tri-State depends on whether Tri-State has rates on file that the Commission has accepted in the exercise of that jurisdiction under FPA section 205(c).[154]

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[150] *Id.* at 22 (quoting 16 U.S.C. §§ 824d(a), 824e(a)).

[151] *Id.* at 23 (citing *Southwestern Elec. Coop. Inc. v. Soyland Power Coop., Inc.,* 97 FERC ¶ 61,008, at 61,020 (2001) (adjudicating dispute over charges in connection with member exit from cooperative); *Am. Wind Energy Ass'n v. Sw. Power Pool*, 167 FERC ¶ 61,033 (2019) (*AWEA v. SPP*); *Midwest Indep. Transmission Sys. Operator, Inc.,* 135 FERC ¶ 61,255 (2011); *Sw. Power Pool Inc.,* 114 FERC ¶ 61,273 (2006); *Sw. Power Pool, Inc.,* 113 FERC ¶ 61,014 (2005); *Midwest Indep. Transmission Sys. Operator, Inc*., 101 FERC ¶ 61,221 (2002)).

[152] *Id.*

[153] *Id.* at 24 (citing *FPC v. S. Cal. Edison Co.*, 376 U.S. 205 (1964) (*Colton*)).

[154] *Id.* at 24-25.

99. Tri-State contends that because the La Plata and United Power complaints before the Colorado PUC fall within the Commission's exclusive jurisdiction, they are preempted.[155] Tri-State argues that once a case is found to fall within the Commission's regulatory turf—i.e., if a case is about "the transmission of electric energy in interstate commerce [or] the sale of electric energy at wholesale in interstate commerce" and does not fall within a specific exception or exemption to the Commission's jurisdiction—the Commission's jurisdiction is exclusive.[156] Tri-State observes that:

> The [FPA] vests in [the Commission] exclusive jurisdiction over wholesale sales of electricity in the interstate market. . . .
>
> Under the FPA, FERC has exclusive authority to regulate "the sale of electric energy at wholesale in interstate commerce." [16 U.S.C.] § 824(b)(1).[157]

In addition, Tri-State notes that the Supreme Court has stated: "A State must . . . give effect to Congress' desire to give the Commission plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority."[158] Tri-State argues that if the Colorado PUC were to proceed to the merits of La Plata and United Power's complaints, this would be an invasion of the Commission's regulatory turf and a direct usurpation of its role.

100. Further, Tri-State argues that, as a practical and policy matter, it would make no sense for the Colorado PUC to proceed with an assessment of the reasonableness of potential exit charges for La Plata and United Power.[159] Tri-State asserts that if La Plata or United Power ultimately choose to exit Tri-State, the terms of their exit will be subject to Commission review, regardless of whether the Colorado PUC has purported to set them. Tri-State argues that any exit terms provided to La Plata and United Power will, via the principle of non-discrimination, and by stranding costs if they exit, have significant effects on Tri-State Utility Members in states beyond the Colorado PUC's jurisdiction and for many years after any question as to the Commission's exclusive

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[155] *Id.* at 25, 29.

[156] *Id.* at 26 (quoting 16 U.S.C. § 824(b)(1)).

[157] *Id.* (quoting *Hughes*, 136 S.Ct. at 1291-92; citing *Barnstable v. O'Connor*, 786 F.3d 130, 137 n.9 (1st Cir. 2015) ("The [FPA] places the regulation of interstate wholesale electric energy transmission and rates exclusively under federal control.")).

[158] *Id.* at 26-27 (quoting *Hughes*, 136 S.Ct. at 1298) (additional citations omitted).

[159] *Id.* at 28.

jurisdiction over Tri-State has been settled. Tri-State argues that for the Colorado PUC to purport to determine exit charges in this context would be contrary to the purpose of the FPA.[160]

b. Comments and Answers

101. Alliance, Empire, K.C. Electric, High West Energy, Highline, and Midwest assert that actual or potential regulation by multiple regulators leads to conflicting rules, legal uncertainty, and litigation costs, all of which impose costs that are ultimately borne by Utility Members and their customers.[161] Empire, K.C. Electric, High West Energy, Highline, and Midwest also claim that regulation by state regulators that favors Utility Members in the regulator's own state destabilizes the interstate cooperative model; specifically, they assert that Utility Members from other states are at risk of being required to cross-subsidize the favored Utility Members in the state of the regulator.[162] Wheat Belt similarly states that it supports Tri-State's decision to become a public utility under the FPA because the change in jurisdictional status fills a "regulatory gap" produced by Tri-State's multi-state operations.[163] Wheat Belt notes that it sought to intervene in a Colorado PUC proceeding initiated by a Tri-State Member that was seeking a determination of exit charges, and the Colorado PUC denied its motion to intervene.[164] According to Wheat Belt, Commission regulation would provide entities like Wheat Belt opportunities to participate in proceedings that impact their interests and afford Members important FPA protections.[165]

102. Alliance contends that the Commission's jurisdiction over Tri-State will help ensure a transparent and streamlined regulatory process, resulting in more cost-effective investments and planning.[166] Alliance asserts that more cost-effective investments and

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[160] *Id.* at 28-29.

[161] Alliance Comments at 3; Empire Comments at 3; K.C. Electric Comments at 3; High West Energy Comments at 4; Highline Comments at 4; Midwest Comments at 4.

[162] Empire Comments at 3; K.C. Electric Comments at 3; High West Energy Comments at 4; Highline Comments at 4; Midwest Comments at 4.

[163] Wheat Belt Comments at 3.

[164] *Id.* at 2-3 (citing Colorado PUC, Proceeding No. 18F-0866E, Motion to Intervene of Wheat Belt, et al. (Jan. 9, 2019)).

[165] *Id.* at 4.

[166] Alliance Comments at 3.

planning will improve reliability of the grid and promote the delivery of clean, renewable energy.[167] Alliance asserts that conflicting rules and regulations, rate structures and uncertainty increase Tri-State's operating costs and ability to effectively plan for and acquire additional generating resources while servicing existing power purchase commitments.[168]

103. Empire, K.C. Electric, High West Energy, Highline, and Midwest state that the power their customers need is generated and transmitted due to investments funded by the mutual commitments Tri-State's Utility Members made by executing long-term Wholesale Service Contracts.[169] They argue that any Tri-State Utility Member that withdraws from that commitment without paying a fair exit charge saddles remaining Utility Members with stranded costs that may impair their ownership interests, increase their rates, and/or undermine the cooperative model.[170] They assert that the Commission's exclusive regulatory jurisdiction over Tri-State's rates and other aspects of its relationships with its Utility Members, including exit charges, eliminates the risk of litigation costs and conflicting decisions by multiple state regulators for Tri-State and its Utility Members.[171] They request a clear and authoritative ruling from the Commission, staking out its exclusive jurisdiction over Tri-State's exit charges.[172] Further, they contend that any state regulatory jurisdiction over the same subject matter is preempted as a result of the Commission's exclusive jurisdiction.[173]

104. La Plata argues that even if the Commission finds that Tri-State is no longer exempt from the Commission's jurisdiction, the Commission should find that state regulators retain authority to oversee establishment of exit charges and should reject

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[167] *Id.*

[168] *Id.*

[169] Empire Comments at 4; K.C. Electric Comments at 4; High West Energy at 5; Highline Comments at 5; Midwest Comments at 5.

[170] Empire Comments at 4; K.C. Electric Comments at 4; High West Energy at 5; Highline Comments at 5; Midwest Comments at 5.

[171] Empire Comments at 5; K.C. Electric Comments at 5; High West Energy Comments at 5; Highline Comments at 5; Midwest Comments at 5.

[172] Empire Comments at 5; K.C. Electric Comments at 5; High West Energy Comments at 5-6; Highline Comments at 5; Midwest Comments, at 5.

[173] Empire Comments at 2, 5; K.C. Electric Comments at 2, 5; High West Energy Comments at 2, 5-6; Highline Comments at 2, 5; Midwest Comments at 2, 5.

Tri-State's request for a declaration of preemption of the relief La Plata seeks from the Colorado PUC.[174] La Plata argues that the Colorado PUC retains authority to establish exit charges because (1) the exit charges are not subject to the Commission's jurisdiction over rates under the FPA; (2) the Colorado PUC is not preempted from establishing a just, reasonable, and nondiscriminatory exit charge; and (3) even if the Commission possesses such authority, it should decline to exercise primary jurisdiction over exit charges.[175]

105. La Plata observes that, in considering the Commission's authority over practices "affecting" a rate, the Supreme Court has approved the D.C. Circuit's holding in *California Indep. Sys. Operator Corp. v. FERC*, "limiting FERC's 'affecting' jurisdiction to rules or practices that '*directly* affect the [wholesale] rate.'"[176] La Plata asserts that exit charges related to the termination of a member-owner's membership in Tri-State fall outside the scope of the Commission's FPA rate jurisdiction. La Plata contends that a member's exit from a cooperative is not a wholesale sale of electric energy or the transmission of electric energy. La Plata argues that accordingly, an exit charge is not a rate for a jurisdictional service and an exit charge is not a practice directly affecting a rate. La Plata asserts that, although exit charges are contemplated by the Tri-State Bylaws, there is no methodology in the Stated Rate Tariff or Wholesale Service Contracts.[177] La Plata argues that, thus, establishing exit charges does not trigger the Commission's jurisdiction.

106. La Plata disagrees with Tri-State that the Colorado PUC establishing exit charges would encroach on the Commission's regulatory turf.[178] La Plata argues that Tri-State has not shown that the Colorado PUC's determination of a nondiscriminatory, just, and reasonable exit charges is a dispute over the transmission or sale of electric energy at wholesale in interstate commerce, or that the outcome of the dispute will "directly affect"

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[174] La Plata Protest at 23.

[175] *Id.* at 23-24.

[176] *Id.* at 24 (quoting *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 774 (2016) (*EPSA*) (citing, *inter alia*, *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (D.C. Cir. 2004) (*CAISO*) (emphasis by the Supreme Court))).

[177] *Id.* at 25.

[178] *Id.* at 26.

any Commission-regulated wholesale rate.[179] Similarly, Sierra Club contends that even if the Commission were at some point in the future to find that it has jurisdiction over Tri-State, Tri-State would need to meet its burden of demonstrating that the outcome of a particular dispute over a particular exit charge would "directly affect" a Commission-regulated rate.[180] Sierra Club argues that the question of whether exit charges for a Tri-State member would directly affect a future Commission-regulated rate of Tri-State, such that Commission jurisdiction would attach, is a fact-specific question that cannot be settled in advance by a declaratory order.[181]

107. Further, La Plata argues that the fact that neither a stated exit charge nor an exit charge methodology has been memorialized further belies Tri-State's claims for preemption. La Plata argues that if Tri-State is subject to the Commission's FPA rate jurisdiction, it is required to place its rates, terms, and conditions on file with the Commission, and La Plata states that there is no exit charge or policy on file.[182] La Plata argues that absent a conflicting rate on file with the Commission, the Colorado PUC is not precluded from establishing a just, reasonable, and nondiscriminatory exit charge for withdrawal from Tri-State.[183] In addition, La Plata asserts that if Tri-State is no longer exempt from Commission regulation and the Commission has the authority to regulate exit charges, the Commission should decline to do so under the doctrine of primary jurisdiction.[184]

108. In Tri-State's February 5 Answer, Tri-State argues that because Tri-State is subject to the Commission's jurisdiction, the Commission has exclusive jurisdiction over the La Plata and United Power exit charge complaints before the Colorado PUC.[185] Tri-State

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[179] *Id.* & n.96 (citing *EPSA*, 136 S.Ct. at 774 (stating that the Commission does not have jurisdiction over items that have only "indirect or tangential impacts on wholesale electricity rates")).

[180] Sierra Club Protest at 25.

[181] *Id.* at 26.

[182] La Plata Protest at 26-27 (citing 16 U.S.C. § 824d(c)).

[183] *Id.* at 27.

[184] *Id.*

[185] Tri-State February 5 Answer at 22.

argues that accordingly, the Colorado PUC's jurisdiction over these complaints is preempted.[186]

109. In Tri-State's February 5 Answer, Tri-State argues that because Tri-State is subject to the Commission's jurisdiction, the Commission has exclusive jurisdiction over the La Plata and United Power exit charge complaints before the Colorado PUC.[187] Tri-State argues that, accordingly, the Colorado PUC's jurisdiction over these complaints is preempted.[188]

110. Tri-State disagrees with La Plata and Sierra Club that the subject matter of the exit charge complaints is not sufficiently related to electricity rates to fall within the Commission's jurisdiction. Tri-State asserts that the exit charges both (1) constitute "charges . . . in connection with" wholesale electricity sales within FPA section 205(a), and a "rate, charge, or classification" relating to wholesale electricity sales within FPA section 206(a); and (2) "affect[]" (by affecting stranded costs and cross-subsidization)) such rates, charges or classification within FPA section 206(a).[189] Tri-State argues that La Plata and Sierra Club fail to address the multiple exit charge cases Tri-State cited in the Petition.[190]

111. Similarly, Wheat Belt argues in its answer that the Commission should protect all members by confirming that exit charges and withdrawal provisions fall within its exclusive jurisdiction.[191] Wheat Belt disagrees with La Plata's claims that the Commission lacks jurisdiction over Tri-State's exit charges because a member's exit from a cooperative is not a wholesale sale of electric energy or the transmission of electric energy and because an exit charge is not a practice directly affecting a rate. Similarly, Wheat Belt disagrees with Sierra Club's argument that Tri-State would need to meet its burden to show an exit charge dispute directly affected a Commission-regulated rate. Wheat Belt asserts that an exit charge is the rate a Utility Member must pay to purchase its way out of the obligations imposed upon it by its Wholesale Service Contract. Wheat Belt contends that there is no reason why the Commission could conclude that a charge for withdrawing from the obligations under a Wholesale Contract

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[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *Id.* (citing Petition at 21-22).

[190] *Id.* (citing Petition at 22-23 & nn.72-73).

[191] Wheat Belt Answer at 15.

does not implicate a wholesale sale of electric energy or the transmission of electric energy.[192]

112. Tri-State notes that La Plata cites to *CAISO* and *EPSA*, two cases that did not involve exit charges or any charges by a seller of wholesale electricity.[193] Tri-State asserts that, in *CAISO*, the D.C. Circuit held only that the composition of the board of a regulated utility did not sufficiently directly "affect" rates and charges to fall within the Commission's "affecting" authority. Tri-State observes that the Supreme Court in *EPSA* affirmed a "commonsense construction" is necessary to prevent the Commission's "affecting" jurisdiction from encompassing any part of the economy that might tangentially affect supply or demand of electricity. Tri-State notes that the Supreme Court held that a reverse payment—from electricity seller to customer, for demand response—fell within the Commission's "affecting" jurisdiction, because it incentivized customers to make commitments that would enable electricity sellers to plan their production at efficient levels. Tri-State argues that the Wholesale Service Contracts are fundamental to planning and financing electricity production and that exit charges are essential to the enforcement of those commitments. Tri-State thus argues that the case for finding that the Commission has jurisdiction here is stronger than in *EPSA*.[194]

113. Tri-State also disagrees with the contentions of La Plata and Sierra Club that because Tri-State does not have the exit charge amounts or formulas on file, the Commission lacks jurisdiction.[195] Tri-State argues that its Petition demonstrates that it is well-established that complaints can be brought under FPA section 206 for charges and other practices within the Commission's jurisdiction, including exit charges, without regard to whether a relevant rate schedule is on file.[196]

114. Similarly, Wheat Belt argues that there is no basis for La Plata's contention that the Commission loses exclusive jurisdiction when a public utility fails to comply with the filing requirements under the FPA.[197] Wheat Belt disagrees with La Plata's assertions that, because there is no exit charge or policy on file with the Commission that could conflict with a state-established exit charge the Commission does not have jurisdiction

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[192] *Id.* at 16.

[193] Tri-State February 5 Answer at 22.

[194] *Id.* at 23 (citation omitted).

[195] *Id.*

[196] *Id.* (citing, *inter alia*, Petition at 23-25).

[197] Wheat Belt Answer at 13-14.

over exit charges and that, consequently, there can be no preemption. If this is true, Wheat Belt contends, it is equally true for the Colorado PUC, where there is no exit charge methodology on file. Further, Wheat Belt argues that there is no basis for La Plata's conclusion because it contravenes the FPA's plain language.[198]

115. Finally, Tri-State disagrees with La Plata's request that the Commission defer to what La Plata characterizes as the Colorado PUC's primary jurisdiction.[199] Tri-State observes that La Plata assumes that the Commission's jurisdiction over Utility Member Wholesale Service Contracts exit charge complaints against Tri-State is not exclusive. Tri-State argues that such premise is false. Tri-State asserts that Supreme Court rulings have repeatedly instructed that the Commission's jurisdiction over wholesale sales and interstate transmission of electricity is exclusive. Tri-State argues that FPA case law uniformly holds that when the question is whether the Commission or state regulators should make a regulatory judgment, concurrent jurisdiction does not exist.[200]

c. Determination

116. As discussed below, although we find that we have jurisdiction over the determination of Tri-State's exit charges, we decline to find that such jurisdiction is exclusive. We also find that the Colorado PUC's jurisdiction over complaints regarding such exit charges is not currently preempted.

117. Under the FPA, the Commission has exclusive jurisdiction over the "transmission of electric energy in interstate commerce," the "sale of electric energy at wholesale in interstate commerce," and "all facilities for such transmission or sale of electric energy."[201] The Supreme Court also has stated that, under the FPA, the Commission "has the authority—and, indeed, the duty—to ensure that rules or practices 'affecting' wholesale rates are just and reasonable."[202] Notwithstanding these findings, however, neither the Supreme Court nor the appellate courts have expressly found that the

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[198] *Id.* at 13.

[199] Tri-State February 5 Answer at 24-25.

[200] *Id.* (citing, *inter alia*, Petition at 25-28).

[201] 16 U.S.C. § 824(b); *see also Hughes*, 136 S. Ct. at 1291 ("The [FPA] . . . vests in the [Commission] exclusive jurisdiction over wholesale sales of electricity in the interstate market"); *Barnstable v. O'Connor*, 786 F.3d at 137 n.9 ("The [FPA] places the regulation of interstate wholesale electric energy transmission and rates exclusively under federal control.").

[202] *EPSA*, 136 S.Ct. at 774.

Commission has *exclusive* jurisdiction over rules or practices that directly affect jurisdictional rates.

118. Although, as Wheat Belt points out, an exit charge is a rate that a Utility Member must pay to purchase its way out of the obligations imposed upon it by its Wholesale Service Contract, we agree with La Plata that Tri-State's exit charges are not a rate or charge for a jurisdictional service itself, i.e., for Tri-State's wholesale services. As La Plata explains, a member's exit from a cooperative is not a wholesale sale of electric energy or the transmission of electric energy.

119. However, contrary to La Plata's assertion, we agree with Tri-State that Tri-State's assessment of exit charges falls within our jurisdiction as a rule or practice directly affecting Tri-State's jurisdictional wholesale rates. The Commission has addressed exit charge disputes in the context of both cooperatives and Regional Transmission Organizations/Independent System Operators (RTOs/ISOs).[203] Those orders indicate that exit charges directly affected the jurisdictional wholesale or transmission rates charged by the public utilities in those cases. For example, in *AWEA v. SPP*, the Commission explained:

> In previous orders, the Commission has stated that the purpose of an exit fee is to: (1) ensure the RTO/ISO's ability to recover its costs and service its debt; (2) ensure withdrawing members do not impose increased responsibility for the RTO/ISO's financial obligations on remaining members; and (3) "ensure that prospective members are serious and have enough of an interest in the RTO" and "help provide stability and avoid volatility in the membership."[204]

[203] *See supra* note 151.

[204] 167 FERC ¶ 61,033 at P 59 (quoting, *inter alia*, *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,255 at P 18 ("The purpose of the exit fees is to hold the loads of MISO's remaining members harmless from increased responsibility for the financial obligations on MISO's balance sheet at the time of a transmission owner's withdrawal. The exit fees are accordingly based on the loads of the withdrawing transmission owner's transmission system, reflecting the responsibility for such costs that would have been borne by those loads if they remained in MISO."); *Sw. Power Pool*, 114 FERC ¶ 61,273 at P 26 ("withdrawal fees help ensure that cost recovery formerly allocated to and the responsibility of members through the payment of their membership fees is not shifted to the remaining members.")).

In particular, the second item listed above demonstrates that exit charges affect the costs RTOs/ISOs assess on remaining members.

120. As Tri-State demonstrates in its Petition, Tri-State's exit charges serve similar functions. For example, as discussed above, Tri-State has noted that in the absence of exit charges, withdrawals from the cooperative could leave remaining Utility Members cross-subsidizing withdrawing Utility Members by paying stranded costs. Thus, Tri-State's exit charges directly affect the wholesale rates it charges, and therefore fall within the Commission's jurisdiction.

121. However, recognizing that no federal court has stated that the Commission has exclusive jurisdiction over rules or practices that directly affect a jurisdictional rate, we decline to find that we have exclusive jurisdiction over Tri-State's exit charges. As a result, we find that the Colorado PUC's jurisdiction over complaints before it regarding Tri-State's exit charges is not currently preempted. A ruling by the Colorado PUC on those complaints would not be preempted unless and until such ruling conflicts with a Commission-approved tariff or agreement that establishes how Tri-State's exit charges will be calculated. We note that Tri-State has not yet filed, and the Commission has not yet approved, a methodology for determining Tri-State's exit charges. If Tri-State seeks to place matters regarding its exit charges before the Commission, it should make an appropriate filing at the Commission, which could include a filing setting forth a methodology for determining such charges.

The Commission orders:

Tri-State's Petition is hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

Entity	Docket Number	Filings
Alliance Power Incorporated and Colorado Highlands Wind, LLC	EL20-16-000	Motion to Intervene Out-of-Time and Comments (Jan. 22, 2020); Motion to Accept Out-of-Time Motion to Intervene and Comments (Jan. 29, 2020)
American Public Power Association	EL20-16-000	Motion to Intervene (Jan. 21, 2020)
Basin Electric Power Cooperative	EL20-16-000	Motion to Intervene
Colorado Public Utilities Commission	EL20-16-000	Notice of Intervention and Response (Jan. 8, 2020); Protest (Jan. 21, 2020); Motion for Leave to Answer and Answer (Feb. 20, 2020)
Colorado Springs Utilities	EL20-16-000	Motion to Intervene (Jan. 16, 2020)
Delta-Montrose Electric Association	EL20-16-000	Motion to Intervene (Jan. 13, 2020)
Empire Electric Association, Inc.	EL20-16-000	Comment (Jan. 21, 2020)
Gladstone New Energy, LLC	EL20-16-000	Motion to Intervene, Motion of Extension of Time, and Request for Shortened Response Period (Jan. 6, 2020); Protest and Request for Evidentiary Hearing (Jan. 21, 2020)
Guzman Energy, LLC	EL20-16-000	Motion to Intervene (Jan. 21, 2020)
Highline Electric Association	EL20-16-000	Motion to Intervene (Jan. 21, 2020)
High West Energy, Inc.	EL20-16-000	Motion to Intervene (Jan. 21, 2020)
Jemez Mountains Electric Cooperative, Inc.	EL20-16-000	Motion to Intervene Out-of-Time (Feb. 4, 2020)

K.C. Electric Association	EL20-16-000	Comment (Jan. 21, 2020); Motion to Intervene Out-of-Time and Comments (Jan. 22, 2020)
Kit Carson Electric Cooperative, Inc.	EL20-16-000	Motion to Intervene Out-of-Time and Protest (Jan. 31, 2020)
La Plata Electric Association, Inc.	EL20-16-000	Motion to Intervene (Jan. 10, 2020); Protest (Jan. 21, 2020); Answer and Motion for Leave to Reply (Feb. 19, 2020); Motion to Lodge (Mar. 16, 2020)
McKenzie Electric Cooperative, Inc	EL20-16-000	Motion to Intervene (Jan. 13, 2020)
The Midwest Electric Cooperative Corporation	EL20-16-000	Out-of-Time Comments (Jan. 22, 2020)
National Rural Electric Cooperative Association	EL20-16-000	Motion to Intervene (Jan. 17, 2020)
Nebraska Public Power District	EL20-16-000	Motion to Intervene (Jan. 3, 2020)
Northwest Rural Public Power District	EL20-16-000	Motion to Intervene and Comments (Jan. 8, 2020)
Old Dominion Electric Cooperative	EL20-16-000	Motion to Intervene (Jan. 13, 2020)
San Miguel Power Association, Inc	EL20-16-000	Motion to Intervene (Jan. 13, 2020)
Sierra Club	EL20-16-000	Motion for Extension of Filing Deadlines (Jan. 8, 2020); Motion to Intervene and Answer (Jan. 9, 2020); Protest (Jan. 21, 2020); Motion for Leave to Answer and Answer (Feb. 19, 2020)
Tri-State Generation and Transmission Association, Inc.	EL20-16-000	Answer to Motions for Extension of Time (Jan. 9, 2020); Motion for Leave to Answer and Answer (Feb. 5, 2020); Answer and Motion for Leave to Answer (Feb. 18, 2020); Answer and Motion to Leave to Answer (Feb. 25, 2020); Answer to Motion to Lodge (Mar.

		17, 2020)
United Power, Inc.	EL20-16-000	Motion to Intervene and Comment (Jan. 21, 2020); Motion for Leave to Answer and Answer (Feb. 12, 2020); Motion to Lodge (Mar. 16, 2020)
Upper Missouri Power Cooperative	EL20-16-000	Motion to Intervene (Jan. 7, 2020)
Western Area Power Administration	EL20-16-000	Motion to Intervene (Jan. 15, 2020)
Wheat Belt Public Power District	EL20-16-000	Motion to Intervene (Jan. 3, 2020); Comment (Jan. 21, 2020); Motion for Leave to Answer and Answer (Feb. 6, 2020)
Xcel Energy Services, Inc.	EL20-16-000	Motion to Intervene (Jan. 6, 2020)